

***United States Court of Appeals  
for the Second Circuit***



**APPENDIX**





*ORIGINAL*

74-2635

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P/S

**United States Court of Appeals**

**For the Second Circuit.**

IN THE MATTER

OF

The Claim for Compensation under the Longshoremen's and Harbor  
Workers' Compensation Act made by EDWARD POTENZA,  
*Claimant-Appellee,*

*against*

UNITED TERMINALS, INC.,

*Employer-Appellant,*

*and*

FEDERAL INSURANCE COMPANY,

*Insurance Carrier-Appellant.*

ON REVIEW OF THE DECISION OF THE BENEFITS REVIEW BOARD OF THE  
UNITED STATES DEPARTMENT OF LABOR.

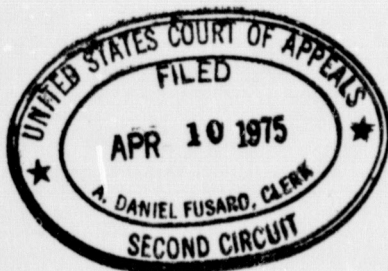
**APPENDIX.**

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New York, N. Y. 10007



THE REPORTER COMPANY, INC., New York, N. Y. 10007—212 732-6978—1975

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UNITED STATES COURT OF APPEALS,  
FOR THE SECOND CIRCUIT.

-----X

IN THE MATTER

of

The Claim for Compensation under the Longshoremen's and  
Harbor Workers' Compensation Act made by EDWARD POTENZA,  
*Claimant-Appellee,*

*against*

UNITED TERMINALS INC.,

*Employer-Appellant,*

*and*

FEDERAL INSURANCE COMPANY,

*Insurance Carrier-Appellant,*

Benefits Review Board of the United States  
Department of Labor.

*Appellee.*

-----X

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PETITION.

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

- - - - -X

IN THE MATTER

of

The Claim for Compensation under the Longshoremen's and  
Harbor Workers' Compensation Act made by EDWARD POTENZA,

*Claimant-Respondent,*

*against*

UNITED TERMINALS INC.,

*Employer-Appellant,*

*and*

FEDERAL INSURANCE COMPANY,

*Insurance Carrier-Appellant,*

Before Benefits Review Board of the United States  
Department of Labor.

BRB No. 74-132.

- - - - -X

The undersigned by and on behalf of United Terminals,  
Inc., Employer, and Federal Insurance Company, Carrier,  
Appellants, pursuant to 33 USCA §921 (c) of the Long-  
shoremen's and Harbor Workers' Compensation Act hereby  
petition this Court for review of a decision of the



## PETITION

Benefits Review Board of the United States Department of Labor, filed October 22, 1974, wherein the Board affirmed a previous ruling of an Administrative Law Judge, of the United States Department of Labor, which held that as a result of an accidental injury of October 2, 1972, compensable under the Longshoremen's and Harbor Workers' Compensation Act, aggravation of a pre-existing cancerous condition of claimant's jaw occurred and based thereupon made an award for compensation against said employer and carrier and further assessed a fee to claimant's attorney against the employer and carrier, and directed that the employer and carrier pay and or reimburse claimant for any medical, dental, surgical, or hospital bills sustained in connection therewith, on the grounds that the decision and awards based on the aggravation of the pre-existing malignancy as a matter of law are not supported by substantial evidence on this record, and that in respect of the award against Appellants for fees to claimant's attorney is not allowable under the provisions of the Longshoremen's and Harbor Workers' Compensation Act in effect at the date of the accident. The accident occurred on a ship afloat on navigable waters and moored at a pier on the East River in New York City.

DATED: December 17, 1974

Respectfully submitted,

Leonard J. Linden  
LINDEN & GALLAGHER  
Attorneys for Appellants  
20 Vesey Street  
New York, N.Y. 10007

5a

PETITION

I hereby certify that I have mailed a copy of the foregoing Petition for Review to William J. Kilberg, Solicitor of Labor, James G. Johnston, Associate Solicitor, Attorneys for the Director, Office of Workers Compensation Programs, United States Department of Labor, Room 4221, Main Labor Building, Washington, D.C. 20210 (202-961-4449), this 17th day of December, 1974.

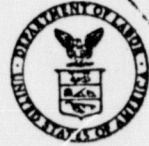
LEONARD J. LINDEN



DECISION AND ORDER OF HON. EDWIN S. BERNSTEIN,  
ADMINISTRATIVE LAW JUDGE.

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES  
WASHINGTON, D.C. 20210



.....  
In the Matter of :

EDWARD POTENZA :

Claimant :

vs. :

Case No. 73-LHCA-111

Formerly No. 2-25193

UNITED TERMINALS, INC. :

Employer :

FEDERAL INSURANCE COMPANY :

Carrier :

.....  
Leon Blaufarb, Esquire  
Kalmanson, Klapper & Blaufarb  
225 Broadway  
New York, New York 10007  
For the Claimant

Leonard J. Linden, Esquire  
Linden & Gallagher  
20 Vesey Street  
New York, New York 10007  
For the Employer  
and Carrier

Before: EDWIN S. BERNSTEIN  
Administrative Law Judge

DECISION AND ORDER

Pursuant to Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 et seq., and the Rules and Regulations implementing the statute, 20 C.F.R. 701, et seq., a

DECISION AND ORDER OF HON. EDWIN S. BERNSTEIN,  
ADMINISTRATIVE LAW JUDGE

hearing of the above-captioned matter was held before me in New York City on October 5, 1973. All parties were represented by counsel and were afforded a full opportunity to adduce evidence and to call, examine and cross-examine witnesses. Thereafter both parties submitted proposed findings and conclusions which I have duly considered.

The principal issue is whether or not a tumorous growth in Claimant's jaw known as ameloblastoma was aggravated or accelerated in growth as a result of a blow that Claimant sustained to his jaw in the course of his employment.

Upon the entire record in this case, my observation of the witnesses and their demeanor and my study of the applicable law, I make the following findings of fact, conclusions of law and order.

Findings of Fact and Conclusions of Law

1. On October 2, 1972, Edward Potenza, Claimant, was employed as a longshoreman by United Terminals, Inc., the Employer. This employment was subject to the provisions of the Longshoremen's and Harbor Workers' Compensation Act (hereinafter called the Act). The liability of the Employer for compensation under the Act was insured by the Federal Insurance Company.
2. On October 2, 1972, Claimant was working on M.V. Assenburg, afloat in the East River at Pier 32, New York City. While engaged in his employment, he was struck on the left side of his face and shoulder by a falling carton of bananas.
3. Claimant continued to work although he felt pain in his jaw and noticed a yellowish, pink mucous in his mouth. He immediately reported the accident to his employer.
4. Dr. Albert Albanese performed a minor surgical procedure on Claimant on October 5, 1972, and at that time



DECISION AND ORDER OF HON. EDWIN S. BERNSTEIN,  
ADMINISTRATIVE LAW JUDGE

found that Claimant had ameloblastoma of the left mandible. This is a tumorous growth. On November 15, 1972, performed further surgery on Claimant in which he removed the tumor and grafted bone to Claimant's jaw.

5. Claimant contended that his October 2, 1972 injury aggravated and accelerated his previously asymptomatic ameloblastoma. Claimant petitioned for compensation for facial disfigurement, 57 days of temporary total disability and the possibility of subsequent compensation if further surgery is required. 1/

6. The parties stipulated that at the time of the accident, Claimant's average weekly wage was \$218.14 and I so find.

7. Four doctors testified at the hearing, Dr. Albanese for Claimant and Drs. Mario Tagliagambe, Harry Lane Robinson, and Harold H. Sage for Respondent.

8. An ameloblastoma is a locally malignant tumor consisting of dental cells. It is relatively rare. It had probably been developing in Mr. Potenza for 20 to 40 years. Until the accident, Claimant had been unaware of its existence and had experienced no symptoms.

9. I find that Claimant's October 2, 1972 injury aggravated the condition of his previously asymptomatic ameloblastoma condition and therefore Claimant is entitled to receive compensation benefits from the Employer and Carrier pursuant to the provisions of the Act.

---

1/ At the hearing, Respondent stipulated that if a causal connection between the trauma and Claimant's condition were found, Claimant's facial disfigurement would be compensable under Section 8(c)(20) of the Act.

DECISION AND ORDER OF HON. EDWIN S. BERNSTEIN,  
ADMINISTRATIVE LAW JUDGE

10. The question of whether trauma can cause or aggravate a malignant tumor is by no means a new one under Workmen's Compensation Laws. I have found many cases in which courts and triers of fact reached an affirmative conclusion often despite strong medical testimony to the contrary. 2/

11. It should be noted that it is not necessary that trauma cause a tumorous condition. All that is needed to be compensable is aggravation. Larsen describes this as follows:

2/ Lefkowitz vs. Silverstein, 203 N.Y.S. 2d 122 (1960); Pittman vs. Pillsbury Flour Mills, 234 Minn. 517, 48 N.W. 2d 735 (1951); Tiller vs. Southern U.S.F. Inc., 246 So. 2d 530 (Miss. 1971); Marsigli's Estate vs. Granite City Auto Sales, Inc., 197 A. 2d 709; Smith vs. Durham Aircraft Service, Inc., 11 App. Div. 552, 200 N.Y.S. 2d 76 (1960); Ryan vs. Syracuse Ornamental Co., 279 App. Div. 1106, 112 N.Y.S. 2d 160 (1952); Glover vs. Columbia Hospital of Richland County, 114 S.E. 2d 565 (S.C. 1960); Taylor vs. Mansfield Hardwood Lumber Co., 65 So. 2d 360 (La. 1953); Strasser vs. Jones, 186 Kan. 507, 350 P. 2d 779; (1960); In re Sullivan's Case, 345 Mass. 762, 186 N.E. 2d 601 (1962); Lumbermens Mutual Cas. Co. vs. Reed, 84 Ga. App. 541, 66 S.E. 2d 360 (1951); Pixley vs. Employers' Mutual Liability Co. of Wisconsin, 102 So. 2d 113 (La. 1958); Normile vs. Thomas P. Spagnoletti Constr. Co., 27 A.D. 2d 169, 277 N.Y.S. 155 (1967); Tonn and Blank, Inc. vs. Curtis, 141 Ind. App. 115, 226 N.E. 2d 551 (1967); Georgia Casualty & Surety Co. vs. Mills, 118 Ga. App. 195, 162 S.E. 2d 909 (1968); Duchess Chenilles, Inc. vs. Goswich, 116 Ga. App. 384, 157 S.E. 2d 304 (1967); De Angelo vs. American Can Company, 11 A.D. 2d 571, 200 N.Y.S. 2d 214 (1960); Parella vs. Harrod Steel Erection Co., 19 A.D. 2d 451, 243 N.Y.S. 2d 982 (1963); Jackson vs. Aarlin Realty Co., 256 N.Y.S. 354; Travelers Inc. Co. vs. Rowand, 197 F. 2d 283 (USCA 5, 1952); American Motorists Insurance Co. vs. Landes, 252 F. 2d 751 (USCA 5, 1958).



DECISION AND ORDER OF HON. EDWIN S. BERNSTEIN,  
ADMINISTRATIVE LAW JUDGE

"'Aggravating' the disease is exemplified by cancer cases in which the malignant growth is ruptured or spread by occupational exertions, or in which its development is hastened by strains, impact, inhalations, or accidents in the course of employment." Larsen, Workmen's Compensation, Vol. 1, Sec. 12.20, p. 3-251.

12. The cases cited are for the most part quite similar to each other. Claimant is usually struck by a blow to some part of his body. Thereafter, and the time of course varies, a malignant tumor is discovered, usually in the area in which he was struck, but not necessarily. The medical evidence adduced usually indicates that the doctors are not sure exactly what causes such growths or whether blows can actually accelerate them. Doctors on each side venture opinions, and decisions for claimants are based of course, not on certainty, but on a reasonable degree of probability.

13. Thus in Travelers Insurance Co. v. Rowand, supra, the U. S. Court of Appeals held that electric shocks to the arm, leg, foot, head and forehead which forced claimant to straddle a pole and strike his scrotum against it was a causative factor of cancer of the testicle. In DeAngelo vs. American Can Company, supra, a claimant who grazed his thigh against part of a truck was found to have aggravated, stimulated and accelerated the growth of rhabdomyosarcoma, a highly malignant tumor. In Lumbermen's Mutual Cas. Co. vs. Reed, supra, where claimant died, the court found that the claimant there "was undoubtedly suffering from a malignant growth which would have produced death within a short period of time" at the time of the accident but nevertheless, because the blow accelerated his death, awarded compensation benefits. In Marsigli's Estate vs. Granite City Auto Sales, Inc., supra, the court awarded death benefits where a claimant who slipped on the ice died of cancer, finding

DECISION AND ORDER OF HON. EDWIN S. BERNSTEIN,  
ADMINISTRATIVE LAW JUDGE

that "the presence of cancer at the time of the fall is undisputed" and that the fall aggravated the pre-existent tumor. In Tiller vs. Southern U.S.F., Inc., supra, a blow to claimant's Jawbone was held to have aggravated a pre-existent malignant tumor. In Old v. Cooney Detective Co., 138 A. 2d 889, a facial fracture was held to have aggravated a pre-existing cancer of the bladder and, "caused him to die from the ravages of cancer sooner than he would have died except for the accident."

14. In the case at bar, the medical opinions are conflicting. Dr. Albanese stated:

"The trauma in my opinion definitely aggravated and stimulated the tumor."  
[Tr. 94]

Dr. Robinson stated:

"I know of no reason to believe that trauma would accelerate the tumor."  
[Tr. 135]

But Dr. Robinson also testified:

"No one knows the cause of an ameloblastoma. It is completely unknown." [Tr. 134]

15. The fact is that medical science is far from certain as to what causes or aggravates malignant growths such as Claimant's ameloblastoma. Furthermore, until he was struck on the jaw, Claimant had lived with this condition for perhaps as many as 40 years. He might well have lived with the condition for many more years but for the accident. It should be noted that Workmen's Compensation statutes such as this are humanitarian acts and should be construed liberally. Pillsbury vs. United Engineering Co., 72 S. Ct. 223, 342 U.S. 197 (1952).



DECISION AND ORDER OF HON. EDWIN S. BERNSTEIN,  
ADMINISTRATIVE LAW JUDGE

16. I cannot find with absolute certainty that aggravation occurred. If such were the standard, few cases would ever be decided. However, taking into consideration all of the facts and the applicable law, I find that Claimant's October 2, 1972 injury, most probably, aggravated his pre-existing ameloblastoma condition.

17. I further find that Claimant was temporarily totally disabled for 57 days, and that Claimant is entitled to be compensated for this 8 1/7 week period at the maximum amount allowed in Section 906(b) of the Act of \$70.00 per week for total disability compensation of \$570.00, less any payments already made.

18. Claimant is also entitled to be reimbursed or paid for, as the case may be, all reasonable medical, dental, surgical and hospital bills to treat the injuries that he sustained as a result of the accident.

19. I further find that Claimant is entitled to receive an additional \$2,000.00 for facial disfigurement in accordance with the provisions of Section 8(a)(20) of the Act.

20. Claimant is also entitled to receive interest of 6 percent computed from the date that each payment was originally due. Strachan Shipping Co. vs. Wedemeyer, 452 F. 2d 1225 (5th Cir. 1971), cert. denied 406 U.S. 958.

21. Leon Blaufarb, Esquire, is entitled to be paid \$800.00 by the Employer and/or Carrier as the reasonable value of his professional services herein which sum includes \$200.00 to be paid by said attorney to Dr. Albert Albanese for his fee for testifying at the hearing in this case.

ORDER

1. The Employer, United Terminals, Inc., and the Carrier, Federal Insurance Company, shall pay to Claimant \$2,570.00 in one lump sum all of which is now payable, less any

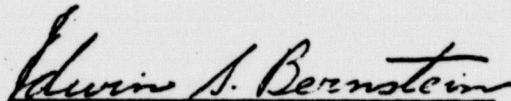
DECISION AND ORDER OF HON. EDWIN S. BERNSTEIN,  
ADMINISTRATIVE LAW JUDGE

payments already made. This includes \$570.00 for temporary total disability and \$2,000.00 for facial disfigurement.

2. The Employer and Carrier shall further pay to Claimant 6 percent interest from the date that each payment was due.

3. The Employer and Carrier shall further pay to and/or reimburse Claimant for, as the case may be, all of Claimant's medical, dental, surgical and hospital bills for injuries sustained as a result of the accident.

4. The Employer and Carrier shall further pay, in addition to the above sums, a legal fee of \$800.00 in favor of Leon Blaufarb, Esquire, which sum includes the amount of \$200.00 to be paid by said attorney to Dr. Albert Albanese for testifying at the hearing.



EDWIN S. BERNSTEIN  
Administrative Law Judge

Dated April 5, 1974  
Washington, D. C.



DECISION OF THE UNITED STATES DEPARTMENT OF LABOR,  
BENEFITS REVIEW BOARD.

U.S. DEPARTMENT OF LABOR  
BENEFITS REVIEW BOARD  
WASHINGTON, D.C. 20210



EDWARD POTENZA )

Claimant )

Respondent )

v. )

UNITED TERMINALS, INC. )

Employer )

and )

FEDERAL INSURANCE COMPANY )

Carrier )

Petitioners )

FILED AS PART  
OF THE RECORD

**OCT 22 1974**

(date)

(Clerk)

Benefits Review Board

BRB NO. 74-132

DECISION

Appeal from Decision of Edwin S. Bernstein,  
Administrative Law Judge, U. S. Department  
of Labor.

Leonard J. Linden (Linden and Gallagher),  
New York, N.Y.

Jean S. Cooper (William J. Kilberg, Solicitor of  
Labor, James G. Johnston, Associate Solicitor)  
for the Director, Office of Workers' Compensation  
Programs, United States Department of Labor,  
Washington, D. C.

Before: Washington, Chairperson, Hartman and  
Miller, Members

This is an appeal by the employer and carrier seeking  
the reversal of a decision and order (73-LHCA-111) of  
Administrative Law Judge Edwin S. Bernstein awarding  
compensation for temporary total disability and facial  
disfigurement. The claim arises under the provisions

DECISION OF THE UNITED STATES DEPARTMENT OF LABOR,  
BENEFITS REVIEW BOARD

of the Longshoremen's and Harbor Workers' Compensation  
Act, 44 Stat. 1424, as amended, 33 U.S.C. §901 et seq.

Claimant was injured in 1972 when he was struck in the face by a falling carton of bananas. The first diagnosis of claimant's condition was that of a contusion of the left side of the jaw. However, three days later, a dental surgeon examined the claimant and diagnosed the condition as an acanthomatous ameloblastoma, a cancer of the jaw.

Surgery was performed, removing a large portion of claimant's jaw bone and replacing it with a bone graft. There is a resulting visible scar extending from the left mandible toward the earlobe.

Uncontradicted medical testimony shows that the cancerous condition had been present for many years prior to this injury. But the medical testimony was conflicting as to whether the injury actually aggravated the pre-existing condition or was merely concomitant in time with the manifestation of the condition. The treating doctor testified that the injury definitely aggravated and stimulated the tumor, which, until the injury, was found by the administrative law judge to be entirely asymptomatic and unknown to the claimant.



DECISION OF THE UNITED STATES DEPARTMENT OF LABOR,  
BENEFITS REVIEW BOARD

The principal issue for determination before the administrative law judge was whether the injury stimulated or aggravated the growth of the cancer in claimant's mouth.

The administrative law judge, admitting that he was not absolutely certain that the condition was aggravated, found that the injury most probably aggravated the pre-existing ameloblastoma condition. An award was made accordingly for temporary total disability, facial disfigurement, for medical treatment and for services rendered by claimant's attorney.

The petitioners appeal alleging that the finding of aggravation of a pre-existing condition is not supported by substantial evidence in the record and that an award to claimant's attorney of a fee to be paid by petitioners is contrary to the law.

Petitioners contend that the only medical testimony upon which the administrative law judge can rely is that of the treating oral surgeon and that this testimony is self-contradictory.

The medical testimony offered at the hearing was conflicting and the testimony relied on by the administrative law judge was admittedly speculative. However, the petitioners' doctor testified that the cause of this type of cancer is unknown. Therefore, any testimony con-

DECISION OF THE UNITED STATES DEPARTMENT OF LABOR,  
BENEFITS REVIEW BOARD  
cerning the cause or aggravation of this condition would  
be speculative.

Workmen's compensation statutes are to be liberally construed, Pillsbury v. United Engineering Co., 342 U.S. 197 (1952), and factual doubts as to causation are to be resolved in favor of the claimant, Friend v. Britton, 220 2d 820 (D.C.Cir. 1955), cert. denied, 350 U.S. 836 (1955). See also Charleston Shipwards v. Lawson, 227 F. 2d 110 (4th Cir. 1955).

The administrative law judge is vested with discretion to select reasonable inferences from the evidence as a whole, and these inferences are to be upheld on review even when his conclusions are contrary to the weight of the medical testimony. Todd Shipwards v. Donovan, 300 F. 2d 741 (5th Cir. 1962).

The finding of causal connection is supported by substantial evidence in the record and is not irrational. O'Keeffe v. Smith Associates, 380 U.S. 359 (1965).

Petitioners' contention that the claimant's attorney's fee cannot be awarded against them has previously been determined by this Board. Naidella v. Campbell Machine, Inc. and Zenith National Insurance Co. BRB No. 73-131 (February 22, 1974).



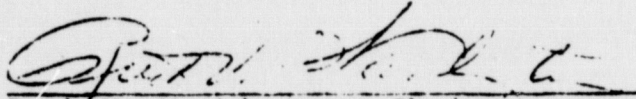
DECISION OF THE UNITED STATES DEPARTMENT OF LABOR,  
BENEFITS REVIEW BOARD

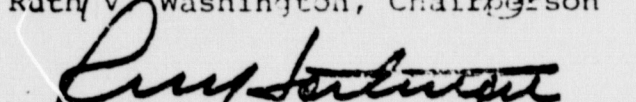
Therefore, the award of an attorney's fee against the employer pursuant to amended Section 23 of the Act, 33 U.S.C. §928, for an injury arising prior to the effective date of the amendment was proper.

Petitioners finally contend that the order to "pay and/or reimburse claimant for, as the case may be, all of claimant's medical, dental, surgical and hospital bills for injuries sustained as a result of the accident" is not in accordance with the law. They contend this is a "flat direction" and that they should be liable only for the reasonable value of such medical services.

The Board fully agrees with the petitioners on this point. However, it is not necessary to modify the order since this potential problem was contemplated by the Secretary of Labor and is fully dealt with by the Rules and Regulations, 20 C.F.R. §702.413 et seq.

The Decision and Order appealed from is affirmed.

  
Ruth V. Washington, Chairperson

  
Ralph M. Hartman, Member

  
Julius Miller, Member

Dated in Washington, D.C.  
this 22nd day of  
October 1974.

TRANSCRIPT OF TESTIMONY.

UNITED STATES DEPARTMENT OF LABOR  
OFFICE OF ADMINISTRATIVE LAW JUDGES

-----X

In the Matter of the Claim for Compensation  
Under the Longshoremen's and Harbor Workers'  
Compensation Act,

EDWARD POTENZA,

Claimant,

-against-

UNITED TERMINALS, INC.,

Employer,

FEDERAL INSURANCE COMPANY,

Carrier.

-----X

CASE NO.  
73-LHCA-111

26 Federal Plaza  
New York, New York  
October 5, 1973  
9:30 o'clock A.M.

BEFORE:

JUDGE EDWIN S. BERNSTEIN,  
Administrative Law Judge

\* \* \*

WILLIAM S. EADDY  
STENOTYPE REPORTER  
183-14 FONDA AVENUE  
ST. ALBANS, N. Y. 11412  
(212) 454-5595





1  
2       APPEARANCES:

3  
4               FOR THE CLAIMANT:

5                       KALMANSON, KLAPPER & BLAUFARB,

6                       225 Broadway

7                       New York, N. Y. 10007

8       BY: LEON BLAUFARB, ESQ., of Counsel.

9               FOR THE EMPLOYER and CARRIER:

10                      LINDEN & GALLAGHER

11                      20 Vesey Street

12                      New York, N. Y. 10007

13       BY: LEONARD J. LINDEN, ESQ., of Counsel.

14  
15                      \*       \*       \*



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JUDGE BERNSTEIN: This is the formal hearing in case No. 73-LHCA-111, formerly case No. 2-25193.

The claimant is Edward Potenza, the employer is United Terminals, Inc., the carrier is Federal Insurance Company.

The proceeding is brought pursuant to Longshoremen's and Harper Workers' Compensation Act and the implementation regulations with respect to the Act.

I am Edwin S. Bernstein, the presiding administrative Judge.

Would counsel please note their appearances.

MR. BLAUFARB: For the claimant, the firm of Kalmanson, Klapper & Blaufarb, by Leon Blaufarb, 225 Broadway, New York City.

MR. LINDEN: Linden & Gallagher for the employer and carrier, by Leonard J. Linden, 20 Vesey Street, New York.

JUDGE BERNSTEIN: During the course of the proceeding the employer and carrier may sometimes be referred to as respondent.

Are there any stipulations to which

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counsel wish to note their agreement?

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MR. BLAUFARB: May we stipulate, Mr.

Linden, that the date of the accident is

October 2, 1972 and that the injury arose

out of and in the course of his employment

as a longshoreman employed by United Terminal?

MR. LINDEN: Yes, so stipulated.

MR. BLAUFARB: May we further stipulate,  
that on or about the 2nd of October, 1972

Mr. Potenza was--sustained an injury to the

left side of his face and left shoulder

while at work?

MR. LINDEN: Yes.

MR. BLAUFARB: When he was struck by a  
box of bananas?

MR. LINDEN: So conceded.

MR. BLAUFARB: May we further stipulate  
as to the authenticity of the records  
produced that constitute the administrative  
file in this matter as compiled by the  
Department of Labor?

MR. LINDEN: Yes, sir, so conceded  
that their original file is here.

MR. BLAUFARB: May we have that



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2

admitted into evidence at this time?

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MR. LINDEN: I have no objection.

4

JUDGE BERNSTEIN: May I see that?

5

(Handing.)

6

JUDGE BERNSTEIN: The reporter will

7

mark this file from the Department of Labor

8

in this proceeding as Joint Exhibit 1.

9

(Whereupon, the file in question was

10

marked Joint Exhibit 1 in Evidence by

11

the reporter as of this date.)

12

JUDGE BERNSTEIN: Go ahead.

13

MR. BLAUFARB: May we also stipulate,

14

if it pleases the Court, that really the

15

only issue here is one of relationship of

16

the accident to the claimed ailment.

17

May we have that stipulation?

18

MR. LINDEN: I think that's so. That's

19

not the only issue. I'm sorry. There is

20

also an issue of responsibility for treat-

21

ment.

22

MR. BLAUFARB: Well, I think if one is

23

answering in the affirmative then the other

24

of course either succeeds or fails.

25

MR. LINDEN: Well, not necessarily.

1

2

But when you finish--

3

4

5

MR. BLAUFARB: So then the record is clear, there is no issue here as to accident, notice or causal relationship?

6

7

MR. LINDEN: There is an issue of causal relationship.

8

9

MR. BLAUFARB: That is the only issue, that of causal relationship?

10

11

MR. LINDEN: And also our responsibility for treatment.

12

13

MR. BLAUFARB: I think that would shorten up the hearing somewhat.

14

15

JUDGE BERNSTEIN: Thank you. Fine. Thank you, Mr. Blaufarb.

16

17

Are there any other matters?

18

19

MR. LINDEN: I don't think so.

JUDGE BERNSTEIN: Mr. Blaufarb, do you wish to make an opening statement?

20

21

MR. BLAUFARB: I'll waive my opening statement at this time.

22

23

24

25

JUDGE BERNSTEIN: Actually your presentation serves the purpose of an opening statement. You acquainted me with the case to some extent.



1  
2 Mr. Linden, would you like to make a  
3 statement?

4 MR. LINDEN: There was never any request  
5 made to us for treatment and any author-  
6 ization requested at the time of this  
7 accident; there was no free choice under  
8 the law. He was required to have treatment  
9 from the employer. We have provided such  
10 treatment and thereafter he went out on his  
11 own.

12 So for the purpose of this particular  
13 point that I am going to call to your  
14 attention, even if it is assumed that this  
15 is a compensable condition, the manner of  
16 the claimant obtaining treatment as such,  
17 that we were not responsible under the law.

18 JUDGE BERNSTEIN: Since you're raising  
19 a point of law, perhaps this is the type  
20 of thing you might care to submit in a  
21 brief at the end of your testimony.

22 MR. LINDEN: Sure.

23 MR. BLAUFARB: Well, in light of that  
24 assertion, Mr. Linden, will you concede that  
25 Dr. Albanese, D.D.S. was referred to the

1

2

claimant herein by the Columbus Hospital?

3

4

MR. LINDEN: You mean the Columbus Hospital referred the claimant to Dr.

5

Albanese?

6

MR. BLAUFARB: Yes.

7

8

MR. LINDEN: I don't know. It seems reasonable.

9

10

MR. BLAUFARB: He will be here in a half-hour.

11

12

13

JUDGE BERNSTEIN: Mr. Blaufarb, can you tell me the names of the witnesses that you plan to produce?

14

15

MR. BLAUFARB: I'll call Mr. Potenza and Dr. Albert Albanese.

16

JUDGE BERNSTEIN: Mr. Linden?

17

18

MR. LINDEN: We will produce Dr. Tagliagambe, Dr. Sage and Dr. Robinson.

19

JUDGE BERNSTEIN: Fine.

20

21

I think we are ready for the first witness.

22

Call your first witness.

23

24

MR. BLAUFARB: One more thing, if it please the Court, Mr. Linden, Dr. Robinson,

25

I take it, sir, is the pathologist?



1

2

MR. LINDEN: That's correct.

3

4

MR. BLAUFARB: Who examined the initial specimen sent by Dr. Albanese to Dr. Robinson?

5

6

7

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MR. LINDEN: Dr. Robinson is the pathologist selected by Dr. Albanese to pathologically examine the specimen which Dr. Albanese took on the procedure which was performed on the first afternoon or day that he saw the claimant in his office.

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MR. BLAUFARB: And, Sir, in looking through the record I have noted that Dr. Robinson's histological report or pathological report is missing and I also noted that in the viewing of this jacket the-- Dr. Albanese makes mention of sending the pathological report to the Federal Insurance Company.

21

22

23

24

25

So do you have a copy of that report with you?

MR. LINDEN: Sure. I was unaware that he had done that because Dr. Albanese wrote a report in November that the--the first time we heard from him, November 3, 1972, wrote a report which we will offer later into

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evidence and I don't know if you have seen it, sir, and in that report he also referred to the fact that he was referring the surgical pathological examination to us. So I have no idea that you didn't have it since he's the claimant's doctor.

MR. BLAUFARB: May we have this marked as part of the--

MR. LINDEN: (Interp'g) Oh, sure. I intended to.

MR. BLAUFARB: As part of the administrative agency's report or jacket.

MR. LINDEN: No objection.

JUDGE BERNSTEIN: Why don't we admit that as Joint Exhibit 2, if everybody is agreeable to that?

MR. LINDEN: I don't know if you notice this, but oddly enough in the Commission's folder, the original file, there is a bill from Dr. Albanese. There it is.

JUDGE BERNSTEIN: Mark it as Joint Exhibit 2.

MR. LINDEN: Here it is for the record. It is almost impossible to decipher but nevertheless it is in the Commission's folder--



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JUDGE BERNSTEIN: (Interp'g) If it is not legible--

MR. LINDEN: (Interp'g) Well, you can see who it is from.

JUDGE BERNSTEIN: Is it legible?

MR. LINDEN: Sure. That part is and it is an exact copy of the one that I just-- that you had just marked, sir, and the Commission has chronologically and sequentially numbered each page in their file and this appears as No. 33 on the back of this particular report. You can make it out. I'll show it to you, sir. I think Mr. Blaufarb just overlooked it. It is certainly easy to do so. But it is in there and if you want the other copy because it is better I certainly will submit that.

JUDGE BERNSTEIN: Yes. This is barely legible. Let's mark this Exhibit 2. It is a much better copy for production.

(Whereupon, the report of Dr. Harry Robinson dated October 10, 1972, was marked Joint Exhibit 2 in Evidence by the reporter as of this date.)

Potenza/~~Cl.~~/Dir.

12

JUDGE BERNSTEIN: Mr. Blaufarb, are  
you ready with your first witness?

MR. BLAUFARB: Mr. Potenza, will you  
take the stand, please.

THEREUPON,

EDWARD POTENZA,

the Claimant herein, residing at 238 Harrison Street,  
Leonia, New Jersey, was called as a witness for and  
in his own behalf and being then and there duly sworn  
by the reporter, assumed the witness stand and upon  
examination testified as follows:

DIRECT EXAMINATION BY MR. BLAUFARB:

Q Mr. Potenza, you are the claimant in a matter  
entitled Edward Potenza against United Terminals,  
Inc., are you not?

A Yes, sir.

Q Mr. Potenza, sometime in October of 1972 you  
were involved in an incident or an accident  
aboard ship, were you not?

A Yes.

Q Now, for the--just for the limited purpose of  
showing the mechanism of the injury, Mr. Potenza,  
this incident occurred on the 2nd of October, 1972  
about 10:30 in the morning, did it not?



Potenza/Dir.

13

1

2

A Right.

3

Q Now, sir, would you describe to us exactly what occurred on that day at that hour?

4

5

A Well, we were breaking out bananas from 8:00 in the morning, a little after eight, breaking out the case of bananas.

6

7

8

Q When you say breaking out, what do you mean?

9

A They come in tiers, from the floor up and then you've got to break them out.

10

11

Q When you say break them out, you mean remove them from a stack of bananas?

12

13

A Yes.

14

Q All right, continue.

15

16

17

18

19

A I was doing that for about two hours and when I went for one tier to break out, a couple of boxes come down and hit me across the face and felt like my bottom plate broke. I took it out--

20

Q (Interp'g) On which side of the face?

21

A The left side.

22

Q So then did the banana--

23

MR. LINDEN: (Interp'g) Just a

24

minute.

25

Will you describe that he's pointing

Potenza/Dir.

14

to the top of the shoulder as well as the  
left side of the face?

JUDGE BERNSTEIN: All right.

THE WITNESS: The left side and face.

Q Tell us how you felt after this incident, Mr.  
Potenza.

A I thought my bridge work was broke.

Q Did your shoulder hurt?

A My shoulder hurt just a little.

Q Did you feel any pain in the left side of your  
face?

MR. LINDEN: I object to that leading.

I object. It is leading, sir.

JUDGE BERNSTEIN: Why don't you re-  
phrase the question? Did you feel any pain?

Q Did you feel any pain?

A No. I felt like my bridge work broke and  
I took it out and it was in one piece, nothing  
wrong with it, and I put it back in my mouth  
and kept on working. I felt like a funny face  
and looked at my handkerchief and it was like a  
little mucous. I continued working.

Q When you say mucous, will you describe what you  
saw on your handkerchief?



1

2

A A yellowish pink.

3

Q And did you continue working after this?

4

A Right up to lunch. Right through. 12:00.

5

I went out and eat, bought a sandwich on Water

6

Street, a ham and cheese sandwich. I went to

7

bite it and it felt like my whole jaw was paining

8

and I went to the timekeeper and they sent me

9

to Columbus Hospital.

10

Q Did they examine you there?

11

A Examined me and x-rayed me and everything

12

and gave me an appointment in ten days to come

13

back to see Dr. Albanese. My jaw was lotharing

14

me and I went to see Dr. Tagliagambe.

15

Q Dr. "Tag"?

16

A Yes.

17

Q When was that?

18

A The 3rd or 4th of October. "Tag" told me

19

that his hours is on Thursday and I think this is

20

a Wednesday or something or Tuesday and with

21

that I went all the way to see him in his office

22

on Eleventh Avenue and some odd street and when

23

I got there there must have been 50 or 60

24

people in the office and I said let me go and I

25

went back to the ILA Clinic--

Potenza/Dir.

1

2 Q (Interp'g) Where is that located?

3 A Sixteenth Street, Sixth Avenue.

4 Q When were you at the ILA Clinic, Mr. Potenza?

5 A I just can't remember the date. Dr. Walsh  
6 there send me downstairs for x-rays and every-  
7 thing.

8 Q Would that be on or about the 3rd of October?

9 A Maybe. I just can't remember the date.

10 Q All right.

11 A So that they called up the Columbus Hospital.  
12 I showed them the slip and they sent me to a  
13 Dr. Mazzo who was there. Dr. Mazzo--

14 Q (Interp'g) Did they x-ray you at the ILA Clinic?

15 A Yes, x-rayed me.

16 And with that they called up--

17 Q Where did you go from there, Mr. Potenza?

18 A Right to the Columbus Hospital.

19 Q You went back to the Columbus Hospital on the  
20 3rd?

21 A Yes. The same day I seen Dr. Walsh.

22 Q Dr. Walsh, I take it is a dentist employed by  
23 the ILA Clinic; is that right?

24 A Yes.

25 Q And when you went back to Columbus Hospital on



1 Potenza/Dir.

2 the 3rd of October, 1972, what did they do for  
3 you?

4 A Mr. Mazzo was up there. He talked to me  
5 and explained to me how my jaw had to be cut and  
6 all. He said they got to take that much of the  
7 jaw off and they got on the phone and called  
8 Dr. Albanese.

9 Q Where was he at that time?

10 A Stevens Avenue in Mt. Vernon. I had a  
11 friend of mine drive me up there.

12 Q On that same day, the 3rd of October?

13 A Yes.

14 So he sat me down on the chair and worked  
15 on me for an hour, cleaned out my whole jawbone  
16 and I felt better and I went to work and it  
17 looked all right and he got in touch with my  
18 wife and told her that I had to go back in the  
19 hospital again, that something was wrong with  
20 me, and then I had the operation.

21 Q And then you returned to the Columbus Hospital,  
22 did you not?

23 A Yes. They operated on me there. I was  
24 there I think 11 days. Albanese operated on me.

25 Q That was about the 13th of December, 1972?

1

2

A Yes.

3 Q

4

5

And subsequent to your hospitalization do you know what kind of operation they did for you at Columbus Hospital in November of 1972?

6

7

A They removed the jawbone and cut a piece of the hip to put inside.

8 Q

Which jawbone?

9

A The left side.

10 Q

Did they remove the entire jawbone or part of it?

11

12

A I don't know. They showed me something about the size of my finger.

13 Q

About three inches?

14

A Yes. That's the plate they put in my jaw.

15 Q

And you left the hospital?

16

A Yes.

17 Q

Did you continue going back to Dr. Albanese?

18

A Yes. Two or three times a week.

19 Q

For how long a period of time?

20

21

A I had a drainage for about five weeks. I was draining pus.

22 Q

Where did you have this drainage?

23

A Right under here.

24 Q

There is a scar underneath there?

25

JUDGE BERNSTEIN: The left part of his



19

3           A       I was on antibiotics, eight or sixteen a  
4           day, and finally it stopped. I had the drainage  
5           for about five or six weeks.

8            A        I seen Dr. Sage.

12                    A        Yes.

15 A After Albanese operated on me.

17 A After they operated on me in the office,  
18 not the hospital.

20                    A     Yes.

22 A About two weeks ago.

24                    A        Yes.

25 Q What did Dr. Albanese do for you when you saw him

Potenza/Dir.

1

2

two weeks ago?

3

A He checked the jaw and said it might be a possible--they might leave the plate in there.

4

5 Q

About how many times have you visited Dr. Albanese all in all, to the best you can recollect?

6

7

A Maybe 20 or 22 times. He lives all the way up in Mt. Vernon.

8

9 Q

During this period of time that you saw him, approximately one year it is now, after the operation, describe what if anything Dr. Albanese did for you?

10

11

12

13

A He chopped on the bottom plate, cut it all down to see if I could use it, could I keep it in my mouth.

14

15

16 Q

Your dental plate?

17

18

A Yes. I can't hold the plate at all in my mouth.

19

20

Q Did you wear a plate at all before your injury?

21

22

A Upper plate only.

23

24

A Only upper plate.

25

Q Outside of Dr. Albanese, Dr. Sage and Dr. Tagliagambe you have seen no other physicians; is that correct?



Potenza/Dir.

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2

A Outside of Walsh in the clinic.

3

Q

Well, outside of the clinic and the hospital?

4

A No, nobody else.

5

Q

How long were you out of work because of this condition, Mr. Potenza?

6

7

A Fifty-seven days.

8

Q

Are you working now, sir?

9

A I went back to work as soon as I could. I need the money. I got a family to support.

10

11

Q

And I take it they took some bone from your hip?

12

A Yes.

13

Q

That's your right hip?

14

A Yes.

15

Q

During this operation they put the bone on the left jaw; is that correct?

16

17

A Yes.

18

Q

Do you have any scar?

19

A Yes. About five or four inches.

20

Q

How do you feel today with respect to your jaw?

21

A Still a little numbness. No pain, just a little numbness.

22

23

Q

You're not able to eat the same way; is that correct?

24

25

A No.





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Potenza/Cross

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MR. BLAUFARB: At Columbus Hospital.

MR. LINDEN: That's right.

MR. BLAUFARB: And then the x-ray report

I have noted, if you will look at the report, it was transcribed on the 5th but he was evidently x-rayed, according to the other note in this record, on the 3rd.

MR. LINDEN: I accept your statement that he was there on the 3rd but it is apparent that the x-rays are dated the 4th.

I'm merely trying to find out what the actual sequence is.

JUDGE BERNSTEIN: Why don't you continue with your questioning, Mr. Linden?

If there is anything you wish to clarify afterwards, Mr. Blaufarb, you can do it on redirect.

MR. BLAUFARB: All right.

Q You told us you went to Dr. Tagliagambe and that his office was filled.

So that he didn't examine you; is that right?

A He looked at me on the pier. This is before I was operated on. And he said, "I won't be back until Thursday." I said, "I want to see you in

Potenza/Cross

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your office. I'm in pain." He told me his office was on Eleventh Avenue in Brooklyn and there were 20 or 30 people there and I didn't stay there and I went to the ILA Clinic.

Q Where did you see Dr. Tagliagambe first?

A On the pier, the Pier 40.

Q Was this the same day that you got hurt?

A No. No. After I got hurt I went to see Tagliagambe and when I seen that slip for a ten-day appointment--

MR. LINDEN: (Interp'g) Let me reconstruct what you told us.

A All right.

Q You told us you got hurt about 10:30 on the 2nd and you worked for an hour or so?

A Until I went out and eat.

Q And you didn't feel well and you went to the timekeeper and he sent you to Columbus Hospital, right?

A Yes.

Q That much you recall and I think it is very clear.

A Yes.

Q And you say that Columbus Hospital gave you a slip to see Dr. Albanese ten days after you left



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Potenza/Cross

25

Columbus Hospital on that first visit?

A Yes.

That was still the 2nd?

A Yes.

On the next day did you go to anybody--

A (Interp'g) I called up the pier. They told me to see Dr. Tagliagambe, that he does work for that pier also.

When did you go to see Dr. Tagliagambe?

A I was in pain. And he told me--I said I would like to have this taken care of. So he gave me his address in Brooklyn. There were 20 or 30 people in the office. With that I left the office and I went to the ILA Clinic.

You say before Dr. Albanese operated on you, you mean before he did the operation in his office?

A Yes.

Because there were two operations: one in the office and one in the hospital?

A Yes.

The one in the office was about October 5th?

**A Yes.**

And the one in the hospital was in November?

**A** Yes.

Potenza/Cross

1

2

Q Coming back again to where we left off, did Dr. "Tag" actually examine you on the pier that first day?

4

5

6

7

8

9

10

11

Q

(Interp'g) I understand.

12

13

14

15

16

Q

A Like in a room?

17

18

Q

A Yes; for the pier's employees.

When if ever after you went to Dr. "Tag"--when I say "Tag," I mean Dr. Tagliagambe. Most people refer to him as Dr. "Tag".

20

21

22

23

24

Q

A After I come out of the hospital.

You didn't see him before you went to the hospital?

25



1

Potenza/Cross

27

2

A I think I seen him after I got the allergies.

3

I think I seen him twice. But the first time I

4

seen him I hadn't been operated on. The first

5

time I seen him I hadn't been touched at all.

6 Q

That we know.

7

A Yes.

8 Q

All right, did you continue to work after October 2

9

for a few days?

10

A Yes, I did work a few days.

11 Q

Until when did you work?

12

A When I got to work, if this was a day that I

13

felt good I went and if I didn't feel good I

14

didn't go in.

15 Q

Just tell me. And we can get it this way.

16

Do you remember whether you worked after

17

Dr. Albanese did the first operation?

18

A Yes.

19 Q

You did?

20

A Yes.

21 Q

And you worked between the time that he did the

22

operation in the office and up until the date that

23

he did the operation in the hospital; is that

24

correct?

25

A Yes.

1	Potenza/Cross
---	---------------

2 Q What did you do, take a day off here and there?

3 A No. If I didn't feel good, like my jaw  
4 bother me, I didn't go to work.

5 Q Do you remember how many days that was?

6 A No.

7 Q Then you worked until they operated on you in  
8 the hospital?

9 A Yes.

10 Q Then you went back to work after the hospital-  
11 ization?

12                    A        Yes.

13 Q When was that?

14 A February 1st; 57 days.

15 Q February 1st?

16                    A        Yes.

17 Q Did you ever ask the timekeeper or your boss for  
18 authorization to go to Dr. Albanese?

19 A Timekeeper or the boss? Dr. Albanese was  
20 recommended by the Columbus Hospital.

21 Q I know. You told us that. I'm not asking you  
22 that. It is a different question.

23                    A     Yes.

24 Q Before you went to Dr. Albanese, did you ask your  
25 employer for authorization to go to Dr. Albanese?



1                                   Potenza/Cross/Redir.                                   29

2           A    No.

3   Q    Did you ask your employer for authorization for  
4        Dr. Albanese to operate on you, either on the  
5        5th of October or in November?

6        A    No. I took it for granted that they sent  
7        me to the hospital. It was their doctor, the  
8        compensation doctor.

9   Q    I'm trying to find out what the fact was.

10           The fact was that you did not ask anybody  
11        at Universal--sorry--at United Terminal or the  
12        insurance company, Federal Insurance Company, for  
13        authorization to be operated on by Dr. Albanese;  
14        is that correct?

15        A    That's correct.

16           MR. LINDEN: I have no further questions.

17   REDIRECT EXAMINATION BY MR. BLAUFARB:

18   Q    Mr. Potenza, if I may, if it please the Court,  
19        did you see Dr. Tagliagambe on the 2nd of October?

20           Excuse me--yes, on the 2nd of October, 1972,  
21        the day of the accident?

22        A    Yes, I did. I think I went to see him the  
23        same day.

24   Q    Did you thereafter see him on or about the 19th  
25        of October, 1972?

1                   Potenza/Redir.

2           A     Yes. I went to see him in his office. That  
3           was before the first operation.

4   Q     That was before the first operation?

5           A     No. After the operation.

6   Q     Before the first operation to replace the bone  
7           in your mandible; is that correct?

8           A     Yes.

9                   MR. BLAUFARB: I have no further  
10           questions.

11                   JUDGE BERNSTEIN: Mr. Linden?

12                   MR. LINDEN: I have no further  
13           questions.

14                   MR. BLAUFARB: If it pleases the Court,  
15           my dentist will be here at 10:30. Right  
16           about now he should be arriving any minute.

17                   JUDGE BERNSTEIN: All right, Mr. Potenza,  
18           you may step down.

19                   (Whereupon, the witness is excused and  
20           retires from the witness stand.)

21                   MR. LINDEN: Dr. "Tag" is on call and  
22           he said as soon as I have some idea as to  
23           when he would be reached if I called him  
24           he would come right over.

25                   Could I make a phone call now and ask



1

2

him to come about quarter after eleven?

3

Would that be suitable you think for him

4

getting here?

5

JUDGE BERNSTEIN: How much time do you

6

estimate your examination will take?

7

MR. LINDEN: Albanese is the most im-

8

portant witness.

9

MR. BLAUFARB: Probably about a half-

10

hour. We have only one issue here.

11

MR. LINDEN: Dr. "Tag" I don't think

12

will take too much time.

13

JUDGE BERNSTEIN: How much time will

14

your cross-examination be?

15

MR. LINDEN: Depending on the answers

16

that he gives. Shouldn't be more than 15

17

minutes.

18

JUDGE BERNSTEIN: Make it 11:15 then.

19

MR. LINDEN: Then we have two other

20

witnesses coming in this afternoon because I

21

couldn't possibly judge what was going to

22

happen in the morning.

23

(Thereupon, a short recess was taken.)

24

(Whereupon, the hearing resumed.)

25

JUDGE BERNSTEIN: Go ahead, counsel.

1 Albanese/Clmt./Dir.

2 MR. BLAUFARB: If it please the Court,  
3 I would like to call Dr. Albert Albanese,  
4 please.

5 JUDGE BERNSTEIN: The witness will take  
6 the stand.

7 THEREUPON,

8 DR. ALBERT ALBANESE,  
9 appearing for and in behalf of the Claimant, with offices  
10 at 105 Stevens Avenue, Mt. Vernon, New York, was called  
11 as a witness and being then and there duly sworn by  
12 the reporter, assumed the witness stand and upon exam-  
13 ination testified as follows:

14 DIRECT EXAMINATION BY MR. BLAUFARB:

15 Q Dr. Albanese, are you a dentist duly licensed to  
16 practice dentistry in the State of New York?

17 A Yes, sir.

18 Q Would you briefly outline your qualifications  
19 and experience, sir?

20 A I graduated from Georgetown Dental School in  
21 1954. I then had an internship in oral surgery  
22 and also a residency in oral surgery at Queens  
23 General Hospital in Jamaica and one year post-  
24 graduate study in oral surgery at N.Y. U.-Bellevue  
25 and I was in general practice of dentistry for



Albanese/Dir.

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8 Q

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15 Q

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18 Q

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22 Q

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four and a half years prior to going into my specialty in oral surgery. I'm now limiting my practice to oral surgery in Mt. Vernon, New York.

I'm a member of the American Board of Oral Surgery, a Diplomate of the American Board of Oral Surgery.

This Diplomate of the American Board of Oral Surgery, is this an honorary thing, sir, or do you have to take an examination and pass tests?

A Examination is required and passing the examination is required. Of course, to take the examination you must meet the training requirements to be eligible for the examination.

Q Do you have any hospital associations as an oral surgeon?

A Yes.

Q What hospitals?

A Columbus Hospital, Chief of Oral Surgery; and Chief of Dentistry and Oral Surgery at Mt. Vernon Hospital.

Q Now, oral surgery, sir, is what kind of specialty?

A As the name implies, it is a specialty regarding the mouth and the surrounding structures-- the jaw, the teeth, the roof of the mouth and the

Albanese/Dir.

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floor of the mouth and the area immediately adjacent to the jaws and teeth.

3

4 Q

Do you reconstruct jaws and mouths and do prosthetic work?

5

6

A Well, the surgical prostheses, not ordinary dental prostheses.

7

8 Q

What is the surgical prostheses as it applies to oral dentistry or oral surgery?

9

10

A It is a portion of the oral cavity is removed surgically and then must be replaced by some prosthesis requiring a surgical procedure. Then that kind of prosthetic work I do.

11

12

13

14 Q

That would involve, for example, bone grafts?

15

A Yes, sir.

16 Q

And do you do the actual surgery on the other part of the anatomy at the donor site or do you have a surgeon do that?

17

18

19

A No. You usually have another surgeon obtain the bone graft for you from the hip.

20

21 Q

And then you replace that graft in the jaw?

22

A Yes.

23 Q

Are you professionally acquainted with one Edward Potenza?

24

25

A Yes.



Albanese/Dir.

35

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2 Q When did you first make professional acquaintance  
3 with Edward Potenza?

4 A I first saw--one year ago today, on  
5 October 5, 1972 in my office.

6 Q This was in Mt. Vernon?

7 A In Mt. Vernon.

8 Q When you first saw Mr. Potenza did he give you a  
9 history?

10 A Yes, he gave me a history. And I also  
11 received a prior history from the doctor at  
12 Columbus Hospital, stating that he had been struck  
13 in the left mandible by a crate of bananas two  
14 or three days prior to my seeing him in my  
15 office and he came into my office with swelling  
16 and contusion on the left mandible and some  
17 fluid exuding from--intraorally from the oral  
18 mucosa.

19 Q When you say intraorally, doctor, what do you  
20 mean?

21 A Inside the mouth. He had some obvious  
22 injury just looking at it from the outside and  
23 on his face and jaws. But looking inside the  
24 mouth he had some contusion and some--a split in  
25 the gum or the mucosa over the left mandible.

1 Albanese/Dir.

2 He was edentulous in his mouth, which is no teeth.

3 And therefore looking at his gum in the area of

4 the injury I could see some contusion and fluid--

5 some discontinuity or interruption of the mucosa

6 from which some brownish-colored fluid emerged.

7 Q When you first saw him and you examined him you

8 observed this fluid exuding from the gum; is that

9 correct, doctor?

10 A Yes.

11 Q And he, I believe, was wearing a lower denture

12 plate?

13 A Yes. yes.

14 Q And that's what you mean when you said he was

15 edentulous?

16 A He was wearing a full prosthetic denture.

17 JUDGE BERNSTEIN: What is mucous?

18 THE WITNESS: It is a lining membrane

19 or you can refer to it as the gum, if you

20 will, the lining membrane or gum of the

21 oral cavity.

22 JUDGE BERNSTEIN: Did he have plates

23 on both his upper and lower gums?

24 THE WITNESS: Yes, I believe he did.

25 JUDGE BERNSTEIN: Thank you, doctor.



Albanese/Dir.

1

2 Q You thereafter examined him; is that correct,  
3 doctor?

4 A Yes.

5 Q Now, sir, prior to examining him or even subse-  
6 quent to examining him, did you obtain a history  
7 or a report of the Columbus Hospital emergency  
8 room?

9 A Yes. I received the information by phone  
10 from the doctor at Columbus Hospital who informed  
11 me of the radiographic findings of the x-rays  
12 which were taken at Columbus Hospital when he  
13 was seen after the 1st, I believe, in the emer-  
14 gency room.

15 Q Now, sir, I show you Joint Exhibit No. 1, which  
16 is a photostatic copy or a copy--Xerox copy of  
17 the emergency room record of Columbus Hospital,  
18 and I ask, sir, if this refreshes your recollection  
19 as to what was--refreshes your recollection as  
20 to what information was transmitted to you?

21 MR. LINDEN: Object.

22 There is no indication that he needed  
23 any refreshment at this point.

24 JUDGE BERNSTEIN: Objection overruled.

25 A This written report is in agreement with

1 Albanese/Dir.

2 what was told to me over the phone by the doctor  
3 who saw the patient and saw the x-ray. that he  
4 did have a large radiolucent or cystic-like lesion  
5 in the left mandible, which is the area which  
6 received the trauma.

7 Q Will you show us where this line was on your own  
8 left jaw, sir?

9 A The line?

10 Q Would you turn around so Judge Bernstein can see  
11 this, sir?

12 A Practically the whole left jaw around in  
13 here, the bone was completely destroyed, the  
14 small portion of the lower portion of the mandible  
15 here, about a sixteenth of an inch, was in tact  
16 and the rest of the mandible was completely des-  
17 troyed.

18 JUDGE BERNSTEIN: Designating from the  
19 chin to the angle of the jaw, a little past  
20 halfway.

21 THE WITNESS: Practically the whole  
22 horizontal.

23 Q And the ramus is part of the mandible, is it not,  
24 doctor?

25 A Yes.



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Q Subsequent to your examination you arrived at a diagnosis, did you not, doctor?

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Q Did you receive the report of Dr. Robinson?

14

15

Q Acanthomatous?

16

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Q What is an ameloblastoma?

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Q Now, sir, this tumor that you observed and was

1 Albanese/Dir.

2 later confirmed by Dr. Robinson, sir, does this  
3 tumor--is this type of tumor related to the  
4 enamel-producing organ?

5 A Yes. It is dry. It is the enamel portion  
6 of the tooth. The cells which go on to make the  
7 enamel portion of the tooth, instead of making  
8 enamel it goes on, as in this case, to form a  
9 tumor.

10 Q And is it of a low malignant type?

11 MR. LINDEN: I object.

12 It is leading.

13 A Yes.

14 JUDGE BERNSTEIN: He's already answered  
15 that question.

16 But in the future I would appreciate  
17 it if you would let him testify more.

18 MR. BLAUFARB: Yes.

19 JUDGE BERNSTEIN: Thank you.

20 Q Now, doctor, did you arrive at any conclusion as  
21 to the age of this tumor?

22 A How long the tumor was in existence?

23 Q Yes, sir.

24 A Well, my opinion based on Dr. Robinson's  
25 report, in which he said that--in which he said



Albanese/Dir.

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this tumor probably originated from a follicular cyst.

3

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Q What is a follicular cyst?

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A A follicular cyst, it means that the cyst originated from the tooth follicle. And the tooth follicle is the very early developmental portion of the tooth which occurs, I would say-- I believe this tooth follicle is from a wisdom tooth in this case. This is purely speculation. No one knows for sure. He had no teeth in his mouth at that time but I would assume this tooth follicle is from the wisdom tooth follicle. It is the early developmental portion of the wisdom tooth which in this case probably originated somewhere around the age of eight or ten years old.

Q And then, sir, is it your view that the tumor had been growing since the day he was eight or ten years old?

A That would be my opinion, yes.

Q This then from what you have just said, and you correct me if I am wrong, doctor, is a very slow-growing thing, is it not?

MR. LINDEN: I object again. It is

Albanese/Dir.

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leading.

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JUDGE BERNSTEIN: He testified it's been growing since eight or ten years old.

5

You can answer the question.

6

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MR. LINDEN: May I point out that that doesn't necessarily indicate the rate of growth at that particular time. That's why I objected.

10

11

JUDGE BERNSTEIN: That's true. Your point is well taken.

12

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I'll change my ruling. Mr. Blaufarb, rephrase the question and please--this appears to be a very important witness. I want to have his testimony on his own and I think it is terribly important that the questions be such as though he testifies completely on his own.

19 Q

20

21

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25

Doctor, can you characterize this tumor as either a fast-growing tumor, a slow-growing tumor or characterize it in any other way you can, doctor?

A Well, I think if this tumor began to originate at the age of eight or ten and reached the size that it did at the age, I believe, of 56, I would certainly characterize this as being a very slow-



1 Albanese/Dir. 43

2 growing tumor.

3 Q Doctor, in your experience as an oral surgeon

4 before seeing Mr. Potenza, had you ever seen one

5 of those before?

6 A Yes, sir.

7 Q About how many had you seen before, doctor?

8 A I have seen approximately four or five.

9 Q And is this a usual type of tumor?

10 A It is a very rare tumor.

11 Q And, doctor, would you tell us what you did for

12 Mr. Potenza when you saw him on the 5th of October

13 after making this--after observing, sir, what

14 you had observed?

15 A You mean when I did the surgical procedure?

16 Q Yes, sir. What did you do that day?

17 A Well, essentially I did a biopsy which

18 consisted of making an incision through the

19 mucoperiosteum of the left mandible on the crest

20 of the bridge, going through this portion of the

21 mucosa, which as I mentioned before, had perfor-

22 ated the oral cavity, from which a brownish-

23 colored fluid had been emerging. I then enlarged

24 the opening which had already been present when

25 I saw him in order to gain access to that large

Albanese/Dlr.

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bone cavity in the left mandible. This gave me access to the bone cavity and having had access to the bone cavity I then went in there with an instrument and corrected out the whole cystic lining of this bone cavity, put this material in a jar with a preservative and mailed this material to Dr. Harry Robinson for biopsy.

Now, this--

A (Interp'g) I then sutured, of course, the opening up which I had made through the muco-periosteum in order to close up the wound.

This lining that you sent to Dr. Robinson, will you describe it, doctor?

A Well, it is a soft-tissue lining; it is analogous to a lining you may find in an egg shell, for instance, which lines the whole inner portion of the egg shell. It is a very thin soft-tissue lining of the bone cavity. The bone cavity itself was smooth and hard and well outlined and well defined, which was obvious even on the x-ray.

Now, doctor, thereafter and after receipt of the pathologist's report you arrived at your diagnosis that you told us before; is that correct?

A Yes.



Albanese/Dir.

1

2 Q

Did you thereafter communicate with Mr. Potenza's employer with respect to your findings?

3

4

A Mr. Potenza's employer?

5 Q

Or did you communicate with United Terminals, Inc. or the Federal Insurance Company, sir?

6

7

A I communicated with someone related to his employer. I'm not sure of the exact individual.

8

9

I may have a copy of it here.

10

Yes, I communicated with Mr. John Munko of

11

the Federal Insurance Company.

12 Q

Did you advise him that Mr. Potenza was scheduled for surgery?

13

14

A Yes, sir, I did.

15 Q

Did he ever communicate with you that there was to be no surgery here, sir?

16

17

A I don't recall him saying there was to be no surgery; because it was my decision to perform surgery. He might have said something to the effect that it was not authorized as far as payment was concerned but I didn't pay any

18

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24 Q

And subsequent to this examination you next saw

25

Mr. Potenza--where did you see him for the next

1

2

time after the 5th?

3

A I believe I saw him the next time at Columbus Hospital.

4

5

Q And that was in November, was it not?

6

A Well, the surgery was done on November 15th in Columbus Hospital of 1972.

7

8

Q Will you just briefly describe what the surgery consisted of?

9

10

A Yes.

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12

The surgery consisted of making an extra-oral incision through the skin over the left mandible. The skin--

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Q (Interp'g) Would you tell us where that incision was made?

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A Over and under the left mandible and I guess it is about a five-inch incision, so as to gain access to the mandible from the outside of the jaw.

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JUDGE BERNSTEIN: Let the record indicate that the witness pointed underneath the left portion of the chin, from the chin towards the ear.

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Q And you thereafter removed a portion of the bone?

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A And through this incision I gained access



Albanese/Dir.

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to the left body of the mandible which showed the tumor bulging out through the lateral aspect of the cortex of the mandible.

The tumor was well outlined when visualized at the time of surgery. I then, using a dental drill, then cut the mandible approximately two cm. on either side of the tumor to be sure that I was removing the entire tumor and that left a gap of approximately six cm. in his mandible; in other words, I removed six cm. of the horizontal portion of the mandible.

Q Doctor, that's roughly three inches, is it not, a little less than three inches?

A A little less than three inches.

Q A piece about like that, right?

A About like that, right.

(Indicating.)

Q Continue, doctor.

A Of course, that left a gap in his mandible. While I was doing this surgery the orthopedic surgeon was working on Mr. Potenza's right hip, removing a portion of bone from the right hip which I was to a few minutes later use as a bone graft replacing the portion of the bone which

Albanese/Dir.

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I removed.

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Q

And you continued to see Mr. Potenza subsequent thereto; is that correct, doctor?

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13

A Yes.

14

Q

And during the course of your--during the course of his visits to you, did you ever prescribe pharmaceuticals for him?

15

16

17

A Yes.

18

Q

What did the pharmaceuticals consist of?

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A Mainly antibiotics; some pills to remove pain. But he did develop a little infection postoperatively, draining fistula from the wound extraorally, which required the treatment of antibiotics and he finally responded to the antibiotic.

25

Q

When was the last time that you saw Mr. Potenza,



1 Albanese/Dir.

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2 doctor?

3 A I guess it was about three weeks ago in my  
4 office.

5 Q Did you examine him then?

6 A Yes, sir.

7 Q What is his present condition, doctor?

8 A The surgery seems to have been successful.  
9 He still has the titanium metal tray in his  
10 left mandible; the bone graft seems to have been  
11 successful and has apparently taken, although we  
12 won't know for sure until we go in there and re-  
13 move the titanium tray and observe the bone graft  
14 under direct vision at the time of surgery.  
15 He had recovered very well from this. He is  
16 still unable to eat solid food and we hope some-  
17 time in the future he will be able to wear a  
18 full lower denture again and that he might be  
19 reasonably expected to eat solid food.

20 But when you consider the type of tumor he  
21 had and the type of surgery and bone graft and  
22 the fact that he has a titanium tray in his  
23 mandible, he's doing as well as anyone would  
24 expect, I would say.

25 Q In your view, does he have a cosmetic defect with

Albanese/Dir.

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respect to the scarring?

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A He has some scarring. Scarring, of course, being that it is mainly under the mandible, it is only of moderate cosmetic importance. I would say the main defect is some distortion and lack of control over his lower lip because the lower left lip has been deprived of its normal source of nerve supply. So he doesn't have the normal feeling or sensation over his lower lip.

Q Will there be any problems with the other organs on the left side of his jaw, doctor?

A What problems on the left side?

Q Such as for mastication and the like.

A As I mentioned, he's restricted now to liquid and soft-solid-type food. He's unable to chew really solid food. I'm hoping that in the future he will be able to increase the consistency of his food as the bone graft gets stronger and if he's able to wear a good full load of denture over his bone graft.

Q Doctor, can you state with reasonable certainty, reasonable medical and dental certainty, whether or not the condition that you found in his jaw was related to the trauma that was described to you?



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A The condition that I saw, that is to say, the contusion and liquid being released in the oral cavity certainly was directly--was directly related to the trauma. The original lesion, the original ameloblastoma had predated the trauma, I would say, several decades. But the condition I saw, apart from the lesion itself, the swelling and contusion, both on the outside of the jaw and on the inside of the jaw, was certainly due to trauma.

Q Are you saying that the striking of the jaw with this crate aggravated or exacerbated this ameloblastoma?

MR. LINDEN: I object. That's leading.

JUDGE FERNSTEIN: Objection sustained.

Q Can you state with reasonable certainty, medical certainty, doctor, whether or not you arrived at an opinion, a medical and dental opinion, as to whether or not the trauma as was described to you aggravated or exacerbated this ameloblastoma?

A I believe it did aggravate it. It probably stimulated it. It was a very slow-growing tumor which had been growing for maybe 45 years and I-- the trauma undoubtedly aggravated it and probably

Albanese/Dir./Cross

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it might have very well stimulated it. But it did produce an opening in the mouth which he obviously didn't have prior to that because he had been wearing his full lower denture, the same denture, for ten years over the tumor which he wasn't aware of it and apparently no one else was aware of and the denture was comfortable and wearing it and getting along perfectly fine.

Now, of course, the denture no longer fits because the area was swollen and, as I say, fluid was being released from the wound.

MR. BLAUFARB: I have no further questions.

CROSS-EXAMINATION BY MR. LINDEN:

Q Well, the area is swollen now because of the operation that was necessarily performed; he's in a postoperative state at this point; is that correct?

A Not really swollen now, I don't believe.

Q Not swollen anymore?

A He has no deformity but I wouldn't say there is any swelling.

Q In other words, then, the acute phases of the postoperative recovery are passing and you expect there will shortly be a time when he will be



Albanese/Cross

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able to assume a full lower denture?

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A We're hoping.

4 Q

I say you expect?

5

A I don't. We are hoping.

6 Q

You inserted the plate for the purpose of filling

7

out the area of damaged bone, bone damaged by

8

the growth that was removed; is that correct?

9

A Yes.

10 Q

And when you originally qualified yourself you

11

spoke of surgical prosthesis.

12

A Yes.

13 Q

This is a surgical prosthesis, is it?

14

A Yes.

15 Q

And the purpose of it is to rehabilitate the

16

mouth to the point where again he will have a

17

useful lower jaw; is that correct?

18

A Yes.

19 Q

And if all goes well and if he's able to tolerate

20

a plate he should be able to chew again and have

21

more solid foods; is that correct?

22

A Yes.

23 Q

And the reason he's not having solid foods now is

24

because he can't chew it?

25

A Well, he can't chew it. I'm not sure if

Albanese/Cross

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the bone graft is sufficiently strong to bear any chewing pressure, even bear a denture at this point.

Q That will take a little time to determine, will it not?

A Yes, sir.

Q I'm not sure of another thing too.

When you referred to some papers a few moments ago, did you refresh your recollection from those papers that you have in front of you?

A Yes.

MR. LINDEN: May I see them, sir?

JUDGE BERNSTEIN: Certainly.

A You want to see the ones that I was looking at or all of them?

Q Whatever you opened up there.

A This is one of them.

Q What is the other one?

A This is Dr. Harrison's biopsy report.

Q These two pieces of paper, the only thing you brought with you was your report of November 3, 1972 directed to Mr. Munko of the Federal Insurance Company and that's a two-page report?

MR. BLAUFARB: And that's Judge



1 Albanese/Cross 55  
2 Bernstein, in the Commission's file and the  
3 other is the surgical pathological report  
4 of Dr. Robinson which we found in the  
5 Commission's folder and I gave you my copy.

6 JUDGE BERNSTEIN: Okay.

7 Q Anything else?

8 A This is the biopsy report at the time of  
9 surgery.

10 Q What you're referring to now is a surgical path-  
11 ology report from Columbus Hospital made at the  
12 time of your operation in the hospital when you  
13 removed most of this tumor; is that correct?

14 A All of it.

15 MR. LINDEN: As part of the original  
16 hospital record, it is in there, Judge  
17 Bernstein.

18 JUDGE BERNSTEIN: All right, fine.

19 Thank you, Mr. Linden.

20 Q Anything else, doctor?

21 A A letter which I wrote to Mr. Floyd Klapper,  
22 dated September 29, 1972. I haven't even viewed  
23 it.

24 Q Okay.

25 When he first came to you the first day you

Albanese/Cross

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saw him, I believe that was October 5th--

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A Yes.

4 Q

--did you call the insurance company up or the employer to ask for authorization to perform the surgical procedure that you did in your office?

5

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A No, I don't believe I did.

8 Q

Did he bring with him the x-rays that had been taken at Columbus Hospital?

9

10

A Yes.

11 Q

So that at your first visit you had not only the telephone information that you told us about--

12

13

Right?

14

A Right.

15 Q

You told us you called Columbus Hospital?

16

A Yes. They called me.

17 Q

But you also had the actual x-ray itself?

18

A Yes.

19 Q

Do you agree with the notation in the Columbus Hospital emergency room record that on the very day of this described episode this man had a huge cystic cavity in his left mandible?

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23

A Well, he had a cavity which was cystic-like.

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The only way we can be sure it was actually

25

cystic is by taking a specimen of the material



Albanese/Cross

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and having it studied under a microscope.

3

Q

What is that again?

4

A The cystic cavity I would assume--

5

You mean a cystic-like cavity?

6

You have to examine it under a microscope

7

to be sure it is cystic.

8

Q

You can get a specimen on gross examination?

9

A On the x-ray you mean? That was their im-

10

pression and the impression is accurate.

11

Q

The impression was correct?

12

A It's not a cyst. It was--

13

Q

(Interp'g) They say cystic.

14

A Yes.

15

Q

It turned out to be an acanthomatous amelo- \*

16

blastoma; is that correct?

17

A Yes.

18

Q

What did this ameloblastoma do to Mr. Potenza's

19

jaw?

20

A Well, as I described earlier, it destroyed--

21

this cystic-like lesion that was described by

22

the x-ray was really destruction of the bone,

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the mandible, leaving only a small portion of

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the bone in tact along the lower border of the

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mandible and actually perforating the upper

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border of the mandible, so that in effect this tumor destroyed a good portion of his mandible. Suppose there wouldn't have been an operation, what would have happened to this man's jaw?

A Well, it undoubtedly would have progressed; the lesion and tumor would have progressed and since it had already been stimulated by the trauma it may have progressed more than the slow rate that it had been in the prior 45 years.

MR. LINDEN: I ask that the answer be stricken. I object to it.

MR. BLAUFARB: You asked for it, sir, and you got it.

JUDGE BERNSTEIN: I'm interested in getting testimony. If you have further questions you elicit the answer.

THE WITNESS: I can clarify that further, if you want.

JUDGE BERNSTEIN: Fine. Do that, doctor.

THE WITNESS: Anytime you're working with a malignant tumor and it is disturbed, surgically you go in and do a biopsy or at the time of surgery you cut into the tumor, the chance of stimulating this tumor, it



1 usually goes up more rapidly and once it is  
2 disturbed either with a surgical scapel or  
3 something else, something that was a  
4 quiescent, slow-growing tumor, this aspect  
5 of this tumor, which had been present per-  
6 haps 45 years before probably--I could not  
7 really be sure--that it would continue to  
8 grow at its same slow pace. This is major  
9 surgery and we don't take this too lightly  
10 and I actually felt that because this now  
11 was stimulated and it was perforated in  
12 the oral cavity that this might have grown  
13 much more rapidly at this point as a mal-  
14 ignant tumor.  
15

16 MR. LINDEN: May I continue, sir?

17 JUDGE BERNSTEIN: Yes.

18 Q Was this tumor malignant?

19 A Yes, sir. It was considered locally mal-  
20 ignant tumor as opposed to--

21 Q (Interp'g) Are you a pathologist?

22 A Beg pardon?

23 Q Are you a pathologist?

24 A I'm an oral surgeon.

25 Q I didn't ask you that, doctor.

1 Albanese/Cross

2 Are you a patholologist?

3 A I have studied pathology. I'm not a full-  
4 fledged pathologist.

5 Q You're not a pathologist, are you?

6 A No.

7 Q Is your answer to me that this is a malignant  
8 tumor?

9 A Yes.

10 Q Was it a malignant tumor before October 1, 1972?

11 A It might have been; yes, sir.

12 Q And this tumor that you have characterized as  
13 malignant and having grown by itself, is prac-  
14 tically the entire destruction of this man's  
15 lower jaw as you've described?

16 A Yes.

17 Q And assume that you had an individual who came to  
18 you without any history of trouble and you found  
19 a tumor to have invaded the lower jaw to the ex-  
20 tent that this did, what would you do?

21 A Well, I would have taken a biopsy, of  
22 course.

23 You mean once the diagnosis was known to  
24 be an ameloblastoma?

25 Q You're answering the question, doctor.



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What would you do?

A What do you mean?

Q You're a physician--

A I'm a dentist.

Q I'm sorry. You're a dentist.

A man comes to you and you examine him and you find that his entire left side of the lower jaw is practically destroyed by something that's going on there. On this first visit, as a dentist, and in exploring this and determining what treatment to give this man, what would you do?

MR. BLAUFARB: I object to that question.

It is speculative. We are dealing here with Edward Potenza, not what he would do with someone else, only with respect to Mr. Potenza.

I object to the form .

If it please the Court, it has no relevancy as well, plus he's making the dentist his own witness.

JUDGE BERNSTEIN: I'm not quite sure I understand the nature of your objection.

MR. BLAUFARB: It is speculative.

If he's asking an expert witness his

Albanese/Cross

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opinion without setting a hypothetical fact  
whatsoever, the form is bad and plus it  
is irrelevant. It doesn't matter what he  
would do with anyone else. What did he do  
with Edward Potenza is the question here.

THE WITNESS: I can clarify that by  
saying--

MR. BLAUFARB: (Interp'g) Let the  
Judge rule on it.

JUDGE BERNSTEIN: Read the question.

(Whereupon, the pertinent question was  
read by the reporter.)

JUDGE BERNSTEIN: I'll sustain the  
objection.

Rephrase your question, Mr. Linden.

Q What is the etiology of an ameloblastoma?

A The etiology is unknown, although there are  
several theories as to the etiology. It could  
be infection, could be trauma and like other  
forms of cancer no one really knows the specific  
etiology. But there are several theories.

Q When you find an individual having a jaw invaded  
by a tumor of this nature, don't you have to  
remove it immediately, as soon as possible



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after you ascertain that such a tumor is present?

MR. BLAUFARB: What is the relevancy of that, if it please the Court? I object.

JUDGE BERNSTEIN: Mr. Linden?

MR. LINDEN: Well, Judge Bernstein, the question here is whether this accident was responsible for the surgical procedures that were performed. It is most relevant, I think to find out what a specialist would do to correct a condition that had advanced to the point that this tumor had advanced to and we know it had advanced to this point without any trauma at all. And I'm trying to find out what the surgical procedure would have been if this man came to him--

MR. BLAUFARB: (Interp'g) Assuming if there had been a procedure and assuming another man would have come to him.

JUDGE BERNSTEIN: I would like to know the answer to that question.

MR. LINDEN: You can answer.

A Restate the question?

Q When you find that a man has a jaw that's been invaded by ameloblastoma and if the jaw is

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practically entirely destroyed, what do you do?

3

A Well, the usual treatment for ameloblastoma is complete surgical excision.

4

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Q That is, quickly as possible; is that right, doctor?

6

7

A I'm not sure what you mean by "quickly as possible." This of course is a slow-growing tumor;

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9

it took in my opinion 45 years to reach this

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point and unlike some more virulent type of

11

malignancies which we see of soft-tissue-type

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cancer around the mouth and other parts of the

13

body, this type of tumor does not require--there

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isn't the same urgency of immediate surgery, ~~it~~

15

although we like to get to it without undue

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delay but not necessarily immediately.

17

Q As a matter of fact, doctor, you as a doctor

18

on finding the presence of such a tumor would

19

operate on it, would you not?

20

A In this case or generally?

21

Q In any case.

22

A It varies. In the younger individual with-

23

out any hesitation we would operate; in an in-

24

dividual of Mr. Potenza's age where it took likely

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say in my opinion 45 years for the tumor to



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reach this level, I'm not sure whether I would

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operate on this type of tumor. I might treat it

4

more conservatively.

5 Q

You don't know whether this trauma did or did

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not in anyway affect the rate of growth of this

7

tumor, do you?

8

A Well, I can only say what our opinion is,

9

as I mentioned previously as to what happens to

10

malignant tumors once they are disturbed either

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surgically or traumatically.

12 Q

My question is, you do not know whether this trauma

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affected the rate of growth?

14

A There is no way to know definitely.

15 Q

You had determined immediately upon receiving

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the report of the biopsy from Dr. Robinson that

17

a second surgical procedure whould be performed

18

to remove the entire tumor; is that correct?

19

A Yes.

20 Q

And didn't you arrive at that determination

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because of the nature of the tumor that existed

22

and the extent of destruction that was apparent

23

in this man's jaw?

24

A Not solely on that basis. But certainly

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those were pertinent considerations.

Albanese/Cross

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2 Q

You said there was serous fluid when you saw this man?

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A Yes.

5 Q

.Do you know when that serous fluid was first noticed?

6

7

A By me or--

8 Q

By anybody.

9

10

11 Q

I know that. You told us that. Now answer my question.

12

13

Do you know when that serous fluid was first

14

noted?

15

A By whom?

16 Q

By anybody.

17

A It was first noticed by me on October 5, 1972.

18 Q

Do you know when it was noticed by anybody or if it was noticed by anybody before you?

19

20

A No, sir, I don't know.

21 Q

Does it take time for serous fluid to accumulate?

22

A Yes, sir.

23 Q

Now, doctor, if in fact this claimant, Mr. Potenza, noticed the serous fluid immediately upon the

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occurrence of this episode, would you then not



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agree that this serous fluid had accumulated  
beneath this man's denture unbeknowing to him?

A No, sir, I don't think so.

Q Well, it would have, wouldn't it?

A Not necessarily.

Q Takes time for serous fluid to accumulate, doesn't  
it?

A I'm sure it was in that cavity possibly for  
years but it wasn't released from the cavity,  
at least in my opinion, until the time of the  
trauma. There is no indication on the part of  
Mr. Potenza or anyone else's part that there  
was any fluid there. I think if it did, it would  
been made aware because there would have been  
foul-tasting, foul-smelling fluid.

Q If there had been any fluid there underneath the  
denture, would that have been fluid that might  
have been somewhat yellowish in color on release?

A The fluid from the lesion? The fluid from  
the lesion which I saw, which I was able to  
visualize directly from his particular cavity  
was a yellow, brown fluid.

Q It takes awhile to form that yellowish fluid?

A It was probably in the cystic cavity for

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many years.

3

Q When the trauma occurred the fluid that was there was then released; is that correct?

4

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A Yes.

6

Q Now, doctor, you saw no blood, did you?

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A I saw a hematoma, contusion and bruising of the oral mucosa inside the mouth, in the area where the fluid was being released from the bone cavity.

Q There was no evidence of blood in the biopsy which you sent to Dr. Robinson, was there?

A Of course the biopsy was full of blood. This was a surgical procedure. There was a lot of bleeding going on.

Q There was no evidence of hemorrhage within the contusion area itself, was there?

A Not active hemorrhage when I saw him. No. But there was some evidence of prior hemorrhage because of hematoma and contusion of mucosa directly above the lesion.

Q Without a history of injury, after having obtained such a biopsy, doctor, wouldn't you have scheduled such an operation to remove that tumor at once?

MR. BLAUFARB: I object. I object. I



Albanese/Cross

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object.

No. 1, I don't feel it is relevant;

No. 2, it was asked and answered before;

No. 3, it is just repetitive.

JUDGE BERNSTEIN: I agree it was asked  
and answered before. But I will permit  
him to answer it again.

Q Would you have scheduled an operation immediately  
after receiving the biopsy?

A Without a history of trauma, is that the  
question?

Q Yes.

A In this case, in view of the age of the  
patient--in a younger individual there would be  
no question about it. In fact, I did do a 23-  
year-old individual with no history of trauma.  
In his age I'm not sure whether I would have  
done the same operation--in fact, I doubt it.  
I would have treated it more conservatively  
because even if it did recur as a result of the  
surgical treatment and because of the age, it was  
a good chance that the tumor would outlive him,  
his life.

JUDGE BERNSTEIN: Let me say something

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to counsel of both sides.

In an administrative hearing such as this I'm interested in having a full and complete record of the testimony, especially of medical witnesses, and in my desire to have such a record made I will allow latitude in terms of questions and answers because I would rather have complete testimony rather than something that is not as complete as it should be.

You may continue, Mr. Linden.

Q In your report of November 3, 1972, didn't you state and I quote: "The patient"--

By the way, you have that report in your own file before you. So you can refer to it as I read.

(Reading.) The patient recovered uneventful from the initial procedure and I'm now preparing for the second phase of the treatment which shall consist of the following. Since this type of tumor is known to recur unless adequately removed I plan to admit Mr. Potenza to Columbus Hospital to perform a partial mandiblectomy--

MR. BLAUFARB: (Interp'g) I object,



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Albanese/Cross

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because that's part of Joint Exhibit No. 1.

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All the reports are in the record at the

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present. I don't see any relevancy whatsoever.

5

It is in the record. It speaks for

6

itself. I would concede that it is in the

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record.

8

JUDGE BERNSTEIN: I would like his

9

answer.

10

MR. BLAUFARB: Answer it.

11 Q

Is that what you said?

12

A Yes.

13 Q

So that the purpose of scheduling the operation

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when you did was to avoid the possibility of the

15

recurrence of the tumor?

16

A Yes.

17 Q

Therefore contrary to the statements that you

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previously made, it was the possibility of the

19

recurrence of the tumor that led you to schedule

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an almost immediate operation rather than what

21

you told us before about some factors of age or

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perhaps he would have lived longer without having

23

the tumor effected by surgery; isn't this true?

24

MR. BLAUFARB: I'll object and I'll

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state my grounds.

Albanese/Cross

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2 Counsel well knows when you asked the  
3 question before he was basing it on a hypo-  
4 thetical without the extra addition of trauma.  
5 If he wants to put a question such as this  
6 let him put it fairly. I object to the  
7 question. It is bad as to form.

8 JUDGE BERNSTEIN: I don't understand you.  
9 I'm a little confused as to why you think it  
10 is unfairly put.

11 MR. BLAUFARB: Heretofore when Mr. Linden  
12 put the question about him having an immed-  
13 iate operation it was put with one proviso:  
14 Without trauma would you have an immediate  
15 operation for this and the witness said it  
16 would depend upon factors such as age, et  
17 cetera, et cetera. Now, he is not adding  
18 all of the essentials in his question put  
19 to the witness--

20 JUDGE BERNSTEIN: (Interp'g) But I  
21 think he's asking him about something that  
22 he's stated before, isn't he?

23 MR. BLAUFARB: But the witness answered  
24 before that it would depend upon age.

25 JUDGE BERNSTEIN: Well, I would like



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for him to answer it again.

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MR. BLAUFARB: Now we have in this report

an extra-added addition of the patient sustaining trauma. Do you see what was done first? A hypothetical question is asked.

JUDGE BERNSTEIN: Yes.

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MR. BLAUFARB: Then the hypothetical question is put in such a way so as to imply that this occurred to the claimant. This is exactly what is happening here.

I object to it.

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JUDGE BERNSTEIN: Let me hear the question again.

(Whereupon, the pertinent question was read by the reporter.)

MR. BLAUFARB: I object to form.

He took a hypothetical question, if it please the Court, where he first asked the witness, assuming no trauma would you do an immediate operation and the witness said it would depend upon the circumstances. Now he takes the report and says here, you say you're going to do an immediate operation so it wouldn't recur and he's still the same age

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but he doesn't add in the factor of trauma.

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JUDGE BERNSTEIN: I understand your objection and I think I'll ask Mr. Linden to rephrase the question.

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MR. LINDEN: The purpose of this question is credibility. In his report of November 3, 1972 it is very clearly stated that the reason why he had scheduled the subsequent procedure was that this tumor recurs. He didn't say that he was scheduling the operation for any reason other than the basic fact which is--and we intend to prove this by subsequent testimony--that when you get a tumor like this you take it out, you don't leave it there for ten minutes if you can help it.

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JUDGE BERNSTEIN: What report are you referring to?

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MR. LINDEN: I'm referring to Page two, the first thorough paragraph on that page.

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JUDGE BERNSTEIN: Of the November 3, 1972 report of Dr. Albanese?

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MR. LINDEN: Yes, sir.

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JUDGE BERNSTEIN: The second thorough



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paragraph?

MR. LINDEN: The first thorough paragraph on Page two.

It reads that the patient recovered uneventfully from the initial procedure and that he is preparing for the second phase of the treatment.

JUDGE BERNSTEIN: Doctor, what did you mean by that statement in your report?

THE WITNESS: Well, it is like any other form of cancer. If you don't adequately remove it it is going to recur.

I think it is a perfectly clear statement. I don't know what counsel is trying to drive at.

I do want to correct counsel, that this is not really immediate surgery.. I first saw him on October 5th and the surgery wasn't done until November 15. Not immediate surgery. We weren't in any particular rush for surgery because, as I mentioned, this is a very slow-growing tumor. I would like to do the surgery the same day if possible. This is not immediate surgery. As a matter

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2 of fact, my original intention was to do  
3 this surgery somewhat later than we did it  
4 but Mr. Potenza wanted it done before Thanks-  
5 giving. So we did it before Thanksgiving.

6 MR. LINDEN: Oh, I see, doctor.

7 Q Well, then following the history that you received  
8 of the trauma to the jaw, following the oper-  
9 ation which you performed in your office, bearing  
10 in mind the type of tumor that this is, at that  
11 point you felt there was no particular urgency  
12 or any haste to do another operation, did you?

13 A Depends upon what you mean by urgency or  
14 haste. It had to be done. It didn't have to be  
15 done in a matter of a few days but it should be  
16 done in a matter of a few weeks.

17 Q So the fact that he had an accident didn't  
18 accelerate your judgment for the necessity of the  
19 operation, did it?

20 A Repeat that again, please?

21 Q The fact that he had an accident did not in your  
22 mind accelerate the need for surgical intervention,  
23 did it?

24 It accelerated the need.

25 In fact, I think it provoked the need. With-



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out the accident there may not have been any need  
for surgery.

Q Well, let's examine that, doctor.

Don't you find that tumors grow--don't you  
find that frequently individuals who have tumors  
or malignancies are unaware of the fact that they  
have such disease process going on within them?

A Of course. They are unaware of it until  
they become aware of it.

Q And isn't the general recommendation where tumors  
and cancers are involved that people whether they  
know or don't know they have cancers, go to reg-  
ular examinations to determine whether any mal-  
ignancies are present?

MR. BLAUFARB: I don't understand the  
question.

MR. LINDEN: I'll ask it again.

I withdraw the question.

MR. BLAUFARB: I don't understand it.

Q Isn't it the general consensus of the dental and  
medical professions that there should be periodic  
examinations of people who are obviously normal  
to determine whether there is some factor un-  
known to them such as a malignancy which is going

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MR. BLAUFARB: I object. It is--I'll concede that everyone should visit their dentist once every six months or sooner. I shall concede that everyone should have a physical examination once every six months or sooner. It has no relevancy, if it please the Court.

MR. LINDEN: Will he also concede that there are people who do not have these examinations and do not go for checkups?

Will you concede that also?

MR. BLAUFARB: Yes. I will so concede, sir, if you concede that at least since August 3, 1964 Mr. Potenza had been seen at the dental clinic at the ILA. It is part of the record, Exhibit 1.

JUDGE BERNSTEIN: The witness has testified that in his opinion this tumor has been building up in the patient's jaw for approximately 45 years. There is no evidence that the tumor has been detected prior to the accident. I don't know why we have to develop this point any further.



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MR. LINDEN: For a very good reason.

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JUDGE BERNSTEIN: All right, you tell

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me.

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Q . Don't you find, doctor, that completely un-

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related episodes sometimes very fortuitously

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calls the attention of the individual to the

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fact that he has a serious condition that needs

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attention?

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MR. BLAUFARB: I object to the question

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because I don't understand it. I really

12

don't.

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JUDGE BERNSTEIN: I will permit the

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answer.

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A The answer is yes.

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Q And isn't it also fortuitous that the tumor was

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found?

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A Fortuitous means good fortune.

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Q The man was fortunate that the accident happened

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when it did, that's exactly what my question is.

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MR. BLAUFARB: Answer it.

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A I don't think this was a fortuitous accident.

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Q You mean that you feel that if an individual has

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a malignancy--

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MR. BLAUFARB: (Interp'g) No. I object

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right off the bat as to form.

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MR. LINDEN: I would like to finish a question.

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JUDGE BERNSTEIN: I think you ought to let him finish his question. Let him finish his question.

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MR. BLAUFARB: I apologize to the Court and to Mr. Linden.

10 Q

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Are you telling us, doctor, that it wasn't fortunate that this man's attention was drawn to the fact that he had a tumor that required medical attention?

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MR. BLAUFARB: I object to the form.

JUDGE BERNSTEIN: On what basis?

MR. BLAUFARB: I don't see the relevancy.

Are they claiming that the happening of the accident and the surgery and the pain-- are they claiming they did Mr. Potenza a service?

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JUDGE BERNSTEIN: I don't think they are. But I think I would like the answer to that question.

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You may answer the question.  
A Well, of course that answer is speculative.



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I can only give you my opinion and it is purely speculative. No one knows for sure what could have become of this tumor if he had not received the trauma and had not been operated on. We only know that this tumor, in my opinion, according to Dr. Robinson's report, that it originated probably from a follicular cyst, probably occurring around the age of ten and we saw him at age 46 or 47. This probably has been going on for 45 or 47 years, somewhere in that, obviously a slow-growing tumor, and if he had not been struck in the jaw he could have gone on the rest of his life without being aware of the tumor.

Q Suppose you had found this tumor 25 years ago, would you have removed it?

A Yes, definitely.

Q You wouldn't have waited to take a chance to see how he would get along in old age?

A Twenty-five years ago I would not have waited. No.

Q As far as the effect of trauma on tumors and malignancies is concerned, is not that a highly speculative thing also?

A No, sir. It's one of the known contributing

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causes of malignancy.

Q You indicated before that you're not a pathologist; is that right?

A Yes.

Q Do you know whether people who specialize in pathology have made a study as to whether this particular type of tumor is affected by trauma in any fashion?

A When you asked me for the etiology of the tumor, no one knows for sure. But trauma is suspected as being one of the possibilities.

Q It has never been demonstrated to be, has it?

A Not to my knowledge.

Q There is no way of your knowing, doctor, whether this trauma did or did not stimulate the growth of this tumor, is there?

A But it stimulated the cells of the tumor and we know from the historical activities of tumors, when the cells are stimulated surgically or traumatically--it doesn't make any difference which way it is stimulated because the cells don't care whether it is the scapel or the trauma which stimulated it--they are known to multiply and propel more rapidly.



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Q You have no evidence of any rapid multiplication

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in this case, do you?

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A No observable evidence. No.

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Q There is no evidence of any actively, rapidly-

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multiplying cells shown in the pathological

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report, is there?

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A Not in the report, no, sir.

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Q As far as the trauma itself is concerned, is this

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a severe or minor trauma?

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A It was not severe trauma. I would say it was

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a moderate type of trauma.

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Q What?

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A Moderate.

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Q A very mild type of trauma, wasn't it, doctor?

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A Well, of course I wasn't there when he was

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struck. But he apparently had a good blow to

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the jaw because he had external evidence of

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bleeding and internal evidence of bleeding.

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Q There were no lacerations in his mouth, were

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there, doctor?

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A Well, he had, as I mentioned, a communication

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between this lesion in the bone and the oral

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cavity, which meant that the mucosa there un-

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doubtedly was split.

1 Albanese/Cross

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2 Q You told us that. I didn't ask you that.

3 MR. BLAUFARB: You asked him that and he's  
4 answered.

5 MR. LINDEN: Then I accept your objection.  
6 I'll rephrase my question.

7 Q What you found was a connection between the cavity  
8 underneath the surfaces of the tissues and the  
9 mouth itself; is that correct?

10 A Yes.

11 Q You didn't find any lacerations, did you?

12 A It is the laceration that caused this com-  
13 munication.

14 Q Did you see a laceration?

15 A There was an opening in the mucosa, which is  
16 a laceration.

17 Q Did you see a laceration?

18 A Yes, sir.

19 Q Was there a laceration other than at the specific  
20 point where there was a point of communication  
21 from the outside to the inside of this cavity?

22 A No, sir. That was the only point at which  
23 there was any.

24 Q Pardon me?

25 A No. Only at that point there was a laceration.



1 Albanese/Cross

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2 Q Do you know that he was wearing a full denture  
3 at the time of the accident?

4 A Yes.

5 Q Wasn't the point of communication exactly over  
6 the site where the tissue had accumulated?

7 MR. BLAUFARB: Where the tissue had  
8 accumulated?

9 MR. LINDEN: Sorry.

10 Q --where the serous fluid had accumulated?

11 A Yes.

12 Q There was no evidence that this blow caused damage  
13 to any other part of this man's mouth, is there?

14 A This is the only external evidence, where the  
15 fluid was being released from the cavity. There  
16 were other areas of hematoma and contusion; no  
17 other areas of laceration, but other evidence of  
18 trauma there.

19 Q Doctor, I only asked you whether there was any  
20 evidence of laceration or penetration of the  
21 tissue at any point except this one single point  
22 over the area of the serous accumulation.

23 MR. BLAUFARB: The doctor answered you,  
24 sir. He said there was hematoma.

25 JUDGE BERNSTEIN: Doctor, where was the

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2 contusion?

3 THE WITNESS: It was on the gum of the  
4 mandible, the jaw--well, practically the  
5 whole left side of his jaw, on the outside  
6 and inside, the gum.

7 JUDGE BERNSTEIN: What other evidence  
8 of trauma?

9 THE WITNESS: Well, the thing that  
10 causes the fluid to be released from the  
11 cystic cavity, the very thin bony partition,  
12 the upper portion of the mandible under the  
13 gum, which apparently had been fractured at  
14 the time of the trauma created an opening  
15 between the mouth and the cystic cavity in  
16 the bone from which this cystic fluid was  
17 being released. This bone was undoubtedly  
18 cracked and fractured as a result of the  
19 procedure.

20 JUDGE BERNSTEIN: Thank you, doctor.

21 You may proceed.

22 Q Where you have a pathology going on, as it was  
23 going on in this man's mouth, can that not lead  
24 to exactly the sort of opening that you saw if  
25 the pathology advances far enough?



1 Albanese/Cross

2 A Yes, sir.

3 Q A lower bridge is moveable, isn't it?

4 A It is removed. He removed it himself.

5 Q And yet this trauma was not of sufficient severity  
6 even to dislodge the lower bridge, was it?

7 A At the time of the trauma you mean?

8 Q At the time of the trauma.

9 A Yes. I don't know that it was dislodged.

10 Q Don't you know that it was not dislodged, doctor?

11 A No, I don't know that either.

12 Q Well, if you assume that if it was not dislodged,  
13 wouldn't that indicate that it wasn't a very  
14 serious blow to the mouth itself?

15 A You say it was not dislodged?

16 Q That's what I am asking you to assume, doctor.

17 A No, on that basis alone I couldn't come to  
18 a conclusion. No.

19 I have seen some real serious accidents  
20 where the mandible was fractured in many different  
21 pieces and so was the maxilla and many other  
22 parts of the skull, and dentures were still in  
23 the mouth.

24 Q You didn't see him for three days after this  
25 episode?

1 Albanese/Cross

2 A Yes, sir.

3 Q Do you know whether there was any evidence of  
4 this communicating opening on the very day that  
5 it occurred?

6 A No, I don't know.

7 Q He didn't have any fracture of the jaw, did he,  
8 doctor?

9 A No, sir.

10 Q There was no evidence of trauma to the tumor it-  
11 self, was there, doctor?

12 A Well, yes. I would say at this point where  
13 the tumor now was penetrating into the mouth  
14 the fluid was being released. Certainly in that  
15 area there was some damage to the tumor. Yes.

16 Q Can't you have, where you have a thin membrane,  
17 as you described, existing at this point where  
18 the merest type of pressure will be sufficient  
19 to release such fluid?

20 A Well, if this partition was thin enough,  
21 yes, it wouldn't take too much pressure.

22 Q So you can have an episode occur which can re-  
23 lease the fluid which cannot be transferred to  
24 the tumor itself, isn't that true?

25 A Repeat the question?



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2 MR. LINDEN: Read the question to him.

3 (Whereupon, the question was read by  
4 reporter.)

5 JUDGE BERNSTEIN: Rephrase your question.

6 THE WITNESS: I'm a bit confused as to  
7 what that means.

8 MR. LINDEN: Then I'll rephrase it.

9 Q Where you have a thin membrane of that sort with  
10 serous accumulation underneath--

11 A Well--

12 Q Let me ask the question, doctor, and if you don't  
13 understand I'll stop. Let me ask the question  
14 first, if you don't mind.

15 Where you have a very thin membrane over an  
16 area of accumulated serous fluid, it doesn't take  
17 much to cause that membrane to break, does it?

18 A It depends on what the membrane is made  
19 of. If it is just a very thin soft tissue mem-  
20 brane it wouldn't take very much but if it is a  
21 bony membrane it would take a stronger blow.

22 Q Wasn't all the bone in this man's jaw so  
23 affected?

24 A The bone was thin in every portion of his  
25 mandible. Yes, sir.

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2 Q So bearing in mind the type of destruction that  
3 had previously been taking place in this man's  
4 jaw, it would take very little trauma to rupture  
5 such a thin diseased bone tissue; is that correct?

6 MR. BLAUFARB: I object to the question.  
7 I fail to see the relevancy.

8 What's the difference whether it is  
9 extensive trauma or minor trauma? The issue  
10 here is whether or not the trauma did in fact  
11 aggravate the ameloblastoma.

12 MR. LINDEN: That's not the issue. The  
13 issue is whether the blow to the jaw which  
14 did occur did anything to the tumor itself.  
15 And it is important to know whether this  
16 trauma is of such severity to begin with  
17 that it can even be considered as the  
18 possible cause. And I say--

19 JUDGE BERNSTEIN: (Interp'g) How is he  
20 in a position to tell what the severity of  
21 the trauma was?

22 MR. LINDEN: That's exactly the point--

23 MR. BLAUFARB: (Interp'g) Didn't he  
24 concede this?

25 MR. LINDEN: May I be permitted to make



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my statement without being interrupted?

JUDGE BERNSTEIN: Yes.

MR. LINDEN: With respect to the circumstances surrounding the occurrence as the claimant has described to you as to what he noticed immediately thereafter, the fact that the bridge was not dislodged at all, he removed it and replaced it and he continued to work; he was seen by Dr. Tagliagambe thereafter--we have him here and he will testify--

MR. BLAUFARB: (Interp'g) Hematoma of the left jaw--

MR. LINDEN: (Interp'g) May I be permitted to continue without interruption?

JUDGE BERNSTEIN: Yes.

MR. LINDEN: --if you look at the emergency room records, they describe the cystic lesion of the left body of the mandible, which they describe as huge and a hematoma, they didn't render any treatment. The claimant has told you that immediately upon removal of his bridge he noticed this mucous, serous sort of yellowish substance

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Now, our contention is that the pathology in this man's jaw was so advanced that anything that occurred would have allowed the beginning of this serous fluid to escape. This however was not sufficient to do anything more than call his attention to a serious condition that was going on for years and about which he was completely unaware and that therefore the trauma did nothing more in effect than to call his attention to the fact that he had a tumor which required attention.

JUDGE BERNSTEIN: Yes, I understand your position. But I still get back to my question: Are you asking him to testify as to the severity of trauma?

MR. LINDEN: No, exactly--

JUDGE BERNSTEIN: (Interp'g) Exactly no or exactly yes?

MR. LINDEN: That he must agree that the trauma was not particularly severe if neither lower plate was disturbed, that there was no area of laceration in his mouth other



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2 than at the point where the serous fluid  
3 escaped and therefore all that happened was  
4 that this very thin diseased area released  
5 fluid and nothing more. That's the purpose  
6 of my cross-examination, to show that  
7 nothing happened.

8 JUDGE BERNSTEIN: Mr. Blaufarb?

9 MR. BLAUFARB: I withdraw my objection.  
10 They are claiming that the striking of the  
11 jaw now was coincidental--not only coinciden-  
12 tal but fortuitous; they did him a favor.

13 MR. LINDEN: We didn't do it and it was  
14 fortunate for him that they found it and  
15 that's what we do intend to prove before  
16 this case is finished.

17 JUDGE BERNSTEIN: Continue with your  
18 questioning, Mr. Linden.

19 MR. LINDEN: Read the question.

20 (Whereupon, the pertinent question  
21 was read by the reporter.)

22 A Well, it is hard to say what constitutes  
23 very little trauma. I would say judging from  
24 the nature of the trauma and his appearance of  
25 his skin externally and the hematoma or bleeding

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under the skin externally and bleeding inside of the mouth, internally, I would not say this is minor or minimal trauma.

Now, had he not had this condition, this preexisting condition, of course the trauma would not have been of a serious nature because it didn't even fracture the jaw and he would have gone on as you mentioned. He didn't receive any treatment in the emergency room and had there not been any preexisting tumor in that mandible that trauma would have been of very, very little significance. It was the tumor present that made this trauma--whether it was major, minor or severe--that made this trauma a highly significant factor. The trauma in my opinion definitely aggravated and stimulated the tumor.

Q Have you now finished?

A Yes, sir.

MR. LINDEN: I ask Judge Bernstein that you strike out that answer. I asked him whether only very slight trauma would be sufficient to rupture this thin membrane that has been left. Instead of answering my question, he's given me an argument.



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1 He's not responsive and he's taken the pos-  
2 ition of an advocate. I ask that it be  
3 evaluated as being unresponsive in view of  
4 what he has testified to as to whether or  
5 not a very slight trauma would be sufficient  
6 in view of the pathology in this man's mouth  
7 to cause an opening from the outside of the  
8 area to the inner area where the serous  
9 fluid had accumulated. That's all I want to  
10 know from him.. Instead I get a speech.

11 MR. BLAUFARB: I would like to say this,  
12 sir: you asked for it and you got it. You  
13 don't put your head in the lion's mouth.  
14 You're a very experienced attorney and merely  
15 because you don't get the answer you want,  
16 sir, don't become upset. It happens all the  
17 time and it will happen again. It happens  
18 time and time again.

19 JUDGE BERNSTEIN: I'm going to deny your  
20 motion. If you have any further questions of  
21 this witness, fine.

22 MR. LINDEN: I'll restate the question  
23 and I want an answer to my question.  
24

25 Q Isn't it true, doctor, that in view of the thinness

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2 of this man's membrane that that very slight  
3 trauma would have been sufficient to cause an  
4 opening to occur from the inside of the mouth  
5 to the inside of the cystic area beneath?

6 A The answer is no.

7 Q Pardon me?

8 A The answer is no.

9 Q A slight trauma would not do it?

10 A How slight is slight? He received more than  
11 a slight trauma to receive that type of trauma  
12 to the inside of the face.

13 Q Was there any laceration of the inside of his  
14 cheek on the left side?

15 A No, sir.

16 Q As a matter of fact, the only place of the hema-  
17 toma was on the outside of his face?

18 A No. There was one on the inside?

19 Q Where?

20 A On the dental ridge and in the area where  
21 this fluid was being released.

22 Q Is that what you told us before, at the point  
23 where there was a connection from the outside to  
24 the inside?

25 A Yes.



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2 Q

Well, there was no other laceration any other place; isn't that true?

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A You said hematoma.

5 Q

I'm including that.

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A The only general area had a hematoma--hematoma is a bleeding area. He had signs of bleeding area under the gum and on the skin on the outside.

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10 Q

Did you describe that anyplace?

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A I don't know if I did or not.

12 Q

As a matter of fact, you didn't ever on this point, have you, doctor?

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MR. BLAUFARB: If it please the Court, this is all argumentative. We are just going over the report. It is in the record.

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JUDGE BERNSTEIN: He testified that he didn't describe it.

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MR. LINDEN: I understand that.

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MR. BLAUFARB: I don't understand why my opponent is so upset.

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22 Q

Can you have a trauma sufficient to cause--

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JUDGE BERNSTEIN: (Interp'g) Excuse me for interrupting.

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MR. LINDEN: Yes, sir?

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JUDGE BERNSTEIN: Can we pick a convenient point in your questioning, if it is going to continue much longer, to recess? Tell me what would be a convenient point in the questioning.

MR. LINDEN: In about three or four minutes I will be finished.

JUDGE BERNSTEIN: All right, we will recess after that.

Q Can you have a trauma, doctor, that would be sufficient to cause the beginning of escape of serous fluid from an area of the sort that you described where the communication was without affecting the tumor itself?

A It is a highly speculative question. No one knows for sure the specific effect. I can only tell you what we know, how tumors generally behave once they are stimulated or traumatized.

Q Well, doctor, you're speculating that this tumor was stimulated, aren't you?

A Yes, sir.

MR. LINDEN: That's all.

JUDGE BERNSTEIN: You have no further questions?



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MR. LINDEN: No further questions.

MR. BLAUFARB: In lieu of any redirect, Mr. Linden, will you concede, sir, as part of the Joint Exhibit No. 1, a virtually illegible dental report is annexed and that with the exception of an entry made on October 3, 1972 about the patient being hit in the left jaw, there is no mention of any ameloblastoma or any invasion whatsoever of the left jaw?

Will you so concede, sir?

MR. LINDEN: Then I would have to ask another question of this doctor if you want me to concede that.

JUDGE BERNSTEIN: Ask your question, Mr. Linden.

MR. LINDEN: What was the date of that examination?

MR. BLAUFARB: October 3, 1972, wherein it is described about the patient being hit in the jaw and seen at Columbus Hospital and that they ordered x-rays; and there is something here about hematoma in this record too.

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2 CONTINUED CROSS-EXAMINATION BY MR. LINDEN:

3 Q Whoever wrote that note that was just referred  
4 to, they apparently didn't pick up the fact that  
5 there was an extremely advanced tumor there,  
6 was there, doctor?

7 MR. BLAUFARB: It is in the x-ray  
8 report.

9 JUDGE BERNSTEIN: I'll allow that  
10 question.

11 A They picked something up on the x-ray--  
12 Q (Interp'g) Doctor, I'm speaking about the note  
13 which was just read to you about which I'm just  
14 asked to make a concession.

15 Apparently, however--

16 JUDGE BERNSTEIN: Finish your question.

17 Q --all you did doctor was refer to what was asked  
18 to be conceded in this note.

19 My only question is that this note didn't  
20 report anything about an enlarged area of the  
21 tumor and a tumor being present. So that who-  
22 ever wrote that note didn't pick it up; isn't  
23 that true?

24 MR. BLAUFARB: I object to the question.  
25 It further states in the report that



1 Albanese/Cross 101  
2 a large radiolucent material had been dis-  
3 covered and prior to that time it had never  
4 been discovered by a dentist.

5 Q Doctor, don't you think it is impossible for the  
6 condition not to have existed the day before and  
7 then found full-blown the day from October 2nd  
8 to October 3rd?

9 A The lesion did exist before. It is impossible  
10 that it did not exist.

11 MR. LINDEN: All right, that's all.

12 MR. BLAUFARB: I have no questions.

13 (Whereupon, the witness is excused  
14 and retires from the witness stand.)

15 JUDGE BERNSTEIN: We will stand in recess  
16 until 1:30 this afternoon.

17 (Whereupon, a luncheon recess was taken  
18 at 12:15 p.m.)

19 (Whereupon, the instant hearing resumed  
20 at 1:45 p.m.)

21 JUDGE BERNSTEIN: Are you ready, Mr.  
22 Linden?

23 MR. LINDEN: Yes.

24 JUDGE BERNSTEIN: Mr. Blaufarb?

25 MR. BLAUFARB: Yes.

1 Potenza/Redir./Recross 102

2 I would like to recall Mr. Potenza  
3 for just one question.

4 JUDGE BERNSTEIN: All right.

5 (Whereupon, the claimant took the  
6 stand.)

7 JUDGE BERNSTEIN: You're still under  
8 oath, Mr. Potenza.

9 THE WITNESS: Yes.

10 REDIRECT EXAMINATION BY MR. BLAUFARB:

11 Q Mr. Potenza, prior to the 2nd of October, 1972,  
12 did you ever have anything oozing from the left  
13 side of your gum?

14 A Never; never had no trouble in my mouth at  
15 all. For the last 25 years I have been wearing  
16 uppers and lowers.

17 MR. BLAUFARB: I have no further questions.

18 RECROSS-EXAMINATION BY MR. LINDEN:

19 Q And prior to October 2, 1972, did you ever notice  
20 anything wrong with your jaw?

21 A Never had any trouble with it.

22 Q Did you ever notice anything wrong with it?

23 A No, sir.

24 MR. LINDEN: That's all.

25 EXAMINATION BY JUDGE BERNSTEIN:



120a

Potenza/Judge

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Mr. Potenza, after you had this injury did you ask the insurance company to treat the injury or did you ask the employer for treatment?

A They send me over to Columbus Hospital and they looked at the x-rays and they got in the corner and started whispering, a few doctors, and they gave me a slip to come back in ten days and that's how I went to Albanese.

Q They sent you to Dr. Albanese?

A They sent me to Columbus Hospital and they turned me over to Albanese.

Q Did you ask them for any permission before you used Albanese?

A They give me a slip.

Q Columbus Hospital did?

A Yes.

Q But not your employer?

A No. They told me to come back within ten days to see Dr. Albanese and then I went to Dr. Tagliagambe and then the ILA and then back to Columbus Hospital and that's when Dr. Albanese operated on me.

Q Before Dr. Albanese operated on you, did you contact your employer and ask them whether they

1  
2 agreed to the operation?

3 A No. I took it for granted, being it was  
4 Albanese and he's the compensation doctor. I  
5 went to him up at his office. I didn't take it  
6 on my own. Being that they recommended him, the  
7 hospital, I went to Albanese.

8 Q You didn't ask any further questions of the em-  
9 ployer?

10 A No. I didn't think he was going to do any-  
11 thing but just look at me. And then he cut me  
12 open and did something on my jaw. We had an  
13 insurance man come to the house and he told me  
14 he was--he was going so fast with the questions  
15 and it was so that I went to the hospital there  
16 would be nothing to get mixed up on. He knows I  
17 was going to the hospital.

18 Q You told him that you were going to the hospital?

19 A Yes. He said he was there to check on me to  
20 see that everything was all right.

21 Q When did he visit your house?

22 A About two weeks before I went to the  
23 hospital.

24 Q Can you recall his name?

25 A My lawyer might know.



Potenza/Judge

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MR. BLAUFARB: Was it Mr. Christenson?

JUDGE BERNSTEIN: Do you have any  
record of that visit, Mr. Blaufarb?

MR. BLAUFARB: I have none. But I  
respectfully submit that the carrier in his  
file has a contact or report or statement  
from Mr. Christenson about Mr. Potenza.

JUDGE BERNSTEIN: I would be interested  
in knowing more about this point.

MR. BLAUFARB: Well, I had been ad-  
vised by Mr. Potenza that he had been seen  
at his home approximately two weeks after the  
incident and I believe Mr. Potenza later  
at an informal hearing contented to me  
that the individual who saw him was later  
at the hearing, Mr. Christenson.

THE WITNESS: Christenson, yes.

MR. LINDEN: We did take a statement  
from him on November 8th and as Dr. Albanese  
has specified, I don't know whether any  
specific attention was paid to it at that  
time. He wrote to the company and the  
company told him that they would not  
authorize the procedure and he felt they

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would not be responsible for the operative procedure that was done at the hospital.

The statement was taken from the claimant on November 8, 1972 and I'm prepared to give it to you if you want it.

JUDGE BERNSTEIN: You say the company said they would not pay for that?

MR. LINDEN: That's right.

JUDGE BERNSTEIN: What do you have in support of that?

MR. LINDEN: Well, you have Dr. Albanese's testimony and let me see if I have anything else.

MR. BLAUFARB: Dr. Albanese said that orally.

JUDGE BERNSTEIN: Well, if there is any further proof either way I would like to have it developed.

MR. BLAUFARB: I believe the Department of Labor Board file beginning with a letter transmitted by Mr. Buckberg to Federal Insurance Company dated the 27th of October states that the claimant Mr. Potenza has visited the Labor Department offices and



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MR. LINDEN: That isn't so, for this reason: we don't know that Dr. Albanese was involved at all and when we were consulted prior to the procedure that took place in Dr. Albanese's office, prior to October 5th, we were later advised that

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Potenza/Judge

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2 Dr. Albanese had been involved in the  
3 treatment of this claimant and he sent a  
4 letter to our company on November 3, 1972,  
5 a letter of which is part of the Commission  
6 file and which you have, where he indicated  
7 what it is he wanted to do. We then had  
8 the claimant examined by Dr. Sage. Dr. Sage  
9 examined this claimant on November 7, 1972  
10 and as indicated in Dr. Albanese's report,  
11 he had noticed the type of tumor that was  
12 involved, stated that it was the type of  
13 tumor that was known to recur unless adequately  
14 removed and he was going ahead with this plan  
15 to remove this tumor or which was medically  
16 proper and Dr. Albanese felt that the op-  
17 eration had to be performed and we certainly  
18 agreed with the fact that the operation had  
19 to be performed but we didn't notify him  
20 orally because there wasn't much time to  
21 go back and forth by correspondence and  
22 Dr. Albanese has so testified. We did  
23 tell him we were not responsible, based  
24 on the findings of Dr. Sage.

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JUDGE BERNSTEIN: Am I to understand,



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Potenza/Judge

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assuming that it can be shown that the

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patient's condition was caused by the trauma,

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you are not disputing the fact that the

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surgery performed by Dr. Albanese was nec-

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essary and was proper and was appropriate

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to correct the condition?

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MR. LINDEN: We believe the surgery

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was absolutely necessary. We believe the

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surgery was necessary October 1st, before

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any accident occurred.

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JUDGE BERNSTEIN: You're not disputing

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that point?

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MR. LINDEN: But we do say that we were

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not consulted regarding the surgery that was

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performed in his office on October 5th.

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We were not consulted about that.

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JUDGE BERNSTEIN: Do you feel that that

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surgery was necessary?

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MR. LINDEN: I feel it was not necessary.

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I feel the only surgery that was nec-

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essary was to remove the whole tumor and

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that's what we intend to prove.

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JUDGE BERNSTEIN: The surgery of October 5th

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you feel was not necessary?

Potenza/Judge

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MR. LINDEN: That's right.

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But if he did the first and had the procedure of the second we say that because he did the first does not make it our responsibility after that, if we are not liable to start with.

JUDGE BERNSTEIN: I understand that, if you are not liable to start with.

MR. LINDEN: Yes.

JUDGE BERNSTEIN: But assuming it develops that you are liable and assume he performed the first, as you say, without the authority, are you disputing that fact that nevertheless in any event the second surgery would have been necessary?

MR. LINDEN: I think the second surgery was necessary right from the start, no question about it. That tumor had to be removed. That's our contention.

JUDGE BERNSTEIN: All right, I have no further questions of this witness.

MR. BLAUFARB: I have none.

MR. LINDEN: I have none.

JUDGE BERNSTEIN: Okay, thank you,



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Mr. Potenza.

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(Whereupon, the witness is excused and  
retires from the witness stand.)

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JUDGE BERNSTEIN: Do you have any  
further witnesses, Mr. Blaufarb?

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MR. BLAUFARB: I have none at this time.

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At this time the claimant respectfully  
rests.

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JUDGE BERNSTEIN: Fine. Thank you,

Mr. Blaufarb.

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MR. LINDEN: Do I understand that he  
has no further witnesses?

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MR. BLAUFARB: I said I rested. That's  
a natural right, if I desire to call any  
rebuttal witnesses.

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JUDGE BERNSTEIN: You may proceed,

Mr. Linden.

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MR. LINDEN: Dr. Tagliagambe.

THEREUPON,

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DR. MARIO F. TAGLIAGAMBE,  
was called as a witness for and in behalf of the Employer  
and Carrier, with offices at 110 President Street,  
Brooklyn, New York, after being then and there duly sworn  
by the reporter, assumed the witness stand and upon

1 Tagliagambe/Emp./Dir.

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2 examination testified as follows:

3 JUDGE BERNSTEIN: All right, Mr. Linden.

4 DIRECT EXAMINATION BY MR. LINDEN:

5 Q Are you a physician duly licensed to practice  
6 medicine in the State of New York?

7 A I am.

8 Q When and where did you graduate?

9 A New York Medical College, 1940.

10 Q Are you qualified under the Workmen's Compens-  
11 sation Board?

12 A I am.

13 Q What are your code letters?

14 A SAC.

15 Q What do they signify?

16 A Specialist in Traumatic Surgery.

17 Q Do you specialize in that?

18 A Yes.

19 Q For how long?

20 A I started my specialized training in 1942 as  
21 a resident at New York Post Graduate Hospital  
22 and have continued thereon thereafter.

23 Q Will you state your hospital connections and other  
24 qualifications for the record, please.

25 A At the present time I'm a full attending at



Tagliagambe/Dir.

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2 Columbus Hospital, New York City and on the  
3 Traumatic and Orthopedic Staff of the Flower  
4 Fifth Avenue, Metropolitan Hospital Center;  
5 Assistant Clinical Professor of Orthopedic  
6 Surgery at New York Medical College.

7 Q At the request of the employer and carrier  
8 did you have occasion to examine Mr. Potenza?

9 A I did.

10 Q Will you tell us in your own fashion, in your  
11 own way, when you saw him, what you did, right  
12 from the very beginning?

13 A The patient was seen on 10/3 following an  
14 incident of trauma on 10/2/72 while working for  
15 United Terminal on the East River, New York City;  
16 that at the time he gave a history that while  
17 working in the hold of a ship, No. 2 hatch, dis-  
18 charging, he was breaking down cases of bananas  
19 when the case came down striking the patient on  
20 the left side of the jaw and left shoulder region.

21 He had gone to Columbus Hospital in New York  
22 for emergency treatment; x-rays were taken and he  
23 was checked by a dentist.

24 Q Did you submit two reports in this case, doctor,  
25 one dated October 3, 1971 and the other October 31, 1972,

Tagliagambe/Dir.

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2 to the Federal Commission?

3 A I did.

4 MR. LINDEN: Those reports, sir, I  
5 believe are in the Commission file.

6 May I show them to the doctor?

7 JUDGE BERNSTEIN: Yes.

8 Q Are these the reports that you submitted, doctor?

9 A They are.

10 Q When you first saw this man, doctor, where did you  
11 see him?

12 A At the office.

13 Q Where?

14 A At Pier 4, North River.

15 Q Did you examine him?

16 A I did.

17 Q What did you see? What did you find, if any-  
18 thing?

19 A There were two findings: No.1, he had a  
20 contusion of the left side of the jaw and, No.2,  
21 contusion and abrasion of the left shoulder  
22 region.

23 Q Did you examine the inside of his mouth?

24 A I did.

25 Q What did you observe?



Tagliagambe/Dir.

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A There was an opening about the size of a pinhead in the left side of the jaw through the mucous membrane at that point. But in my opinion I did not even include that as part of the findings that were related to this type of injury.

Why not, sir?

A Because it was trauma to the outer aspect and it was a glancing type blow to the jaw, from that point on down to the shoulder, and I didn't see any interrelationship between this particular finding and the injury.

Q Did you see any evidence of laceration or contusions, cuts, bleeding or anything else within the mouth except for this one particular area where you say you saw a perforation?

A No, sir.

Q In your opinion, was this perforation caused by the accident?

A At that time I felt it was not.

Q Now, did you subsequently review the x-ray findings and the records of the Columbus Hospital?

A I did, sir.

Q Are you familiar with the diagnosis in this case?

A I am, sir.

1 Tagliagambe/Dir.

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2 Q Do you know what it is?

3 A Yes.

4 Q What is it, sir?

5 A I have a pathological report here.

6 It is a neoplastic fibroma of the mandible.

7 Q What is that, doctor?

8 A A growth affecting the bony structure of  
9 the jaw, the left side of the jaw in this part-  
10 icular case. It is considered within the mal-  
11 ignant type diseases but of a localized nature  
12 by some; by some it is considered to be on the  
13 borderline and still within normal limits of a  
14 benign growth.

15 What is known about these things is that  
16 they are fairly localized lesions and as a rule  
17 do not have any metastatic problems, where they  
18 spread throughout the body. You get different  
19 reports as to whether it is a low-grade malignancy  
20 or whether it is a borderline lesion and I'm  
21 not a pathology specialist and I may be wrong  
22 on that but this is some of the reading that I  
23 have done on this.

24 Q Where was the tumor itself?

25 A Right within the left mandible.



Tagliagambe/Dir.

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2 Q Now, the claimant has told us that at the time of  
3 this injury he was struck on the side of the face  
4 and shoulder by this box which fell against the  
5 left side of his mouth; that he had a denture in  
6 his mouth, was not loosened or knocked out in  
7 any fashion; he removed it immediately after this  
8 happened and as he did so he noticed there was  
9 some mucous-like substance there, sort of yellow.

10 Now, doctor, what is the significance of  
11 that finding immediately upon the occurrence of  
12 this episode, in your opinion?

13 A I'm not too sure it had any bearing or  
14 relationship with the trauma.

15 Q In your opinion, doctor, is there any indication  
16 of injury to the tumor itself in this case?

17 A Well, there was none clinically, as best  
18 as that could be ascertained and there certainly  
19 was none on x-ray.

20 Q On the basis of the pathological findings of a  
21 specimen taken by the claimant's doctor following  
22 the procedure in his office on October 5, 1972,  
23 is there any indication in that pathological  
24 report that trauma had occurred to the structures  
25 in the area of the tumor?

1 Tagliagambe/Dir. 118

2 A No, sir.

3 Q Do you believe there is any relationship at all  
4 between the occurrence which was described and  
5 this tumor?

6 A There is none, sir.

7 Q Now, if you found a tumor like this in an  
8 individual who had not been previously aware of  
9 its presence, what would be the treatment of  
10 choice?

11 A Well, I'm not specializing in that part-  
12 icular area. I would certainly send him to an  
13 ear, nose and throat or head and neck specialist.  
14 From my knowledge, based on my readings and  
15 association with some of these cases, the treat-  
16 ment of choice is complete excision of the  
17 tumor mass.

18 Q Would that be your decision whether or not there  
19 had not been a trauma?

20 A Absolutely.

21 Q Is there any indication that the cells had in  
22 anyway been activated, spread or in anyway acceler-  
23 ated by virtue of this occurrence taking place?

24 A There was no evidence on x-rays or clinically  
25 that any acceleration, stimulation, as I heard



Tagliagambe/Dir.

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it this morning, took place.

Q In view of the description of the episode as I have had to ask you to assume as to what happened to the claimant a few moments ago and as he described it to you at the time that you first saw him and on the basis of your clinical examination when you first saw him, is there any measure to determine whether this was a severe injury?

A Yes, there is.

With the amount of pathology that was present in this bone, that is, the cystic lesion, and the destruction of this bone structure that had taken place, any severe injury or even moderate type of injury would have broken that remaining lining because it had thinned down to a great extent and they would then refer to such a fracture as a pathological fracture rather than a true-type fracture without any pathology.

Q When you say it would have broken something, what would it have broken?

A The mandible itself.

Q Was there any evidence of fracture of the bone structure in this case?

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A The x-rays were negative for any bony pathology.

Q How would that affect your evaluation of the trauma as to whether it was moderate or severe or mild?

A Insofar as the bony condition is concerned, there was no evidence that there was any degree of trauma to the bony structure itself. It would be on the mild basis, based on all the factors present, because it was more of a soft-tissue type of thing; it was a glancing blow from the side of the face going out to the shoulder.

MR. LINDEN: That's all.

CROSS-EXAMINATION BY MR. BLAUFARB:

Q Doctor, for the record, when did you see Mr. Potenza the first time?

A On 10/3.

Q Well, I believe when Mr. Linden showed you the report before, sir, you told us that this was your record, is it not?

A That is a copy; yes, sir.

Q A copy?

A Yes.

Q Do you have a copy of it here, do you not, doctor?

A Yes, sir.



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2 Q Will you look at your copy in item No. 10 and  
3 tell us what the date set forth in that copy is?

4 A In my copy I made a correction. On the  
5 typewritten aspect of it they said 10/2 but the  
6 accurate statement is 10/3. The date of accident  
7 was 10/2 but I first saw him on 10/3. I corrected  
8 it on my copy, sir, and--

9 Q (Interp'g) When did you correct it on your copy,  
10 doctor?

11 A 1972, I guess within--before the last report  
12 was sent out or right afterwards when I reviewed  
13 this thing. I have a bill stating that the first  
14 treatment was on 10/3.

15 Q What is a hematoma, doctor?

16 A It is a localized collection of blood; a  
17 localized collection of blood.

18 Q What is a contusion, doctor?

19 A Contusion is almost synonymous to a bruise.

20 Q Do you need a severe contusion in order for it  
21 to develop into a hematoma?

22 A No, not necessarily.

23 You can break a little blood vessel and--  
24 this man did not have a hematoma, by the way.

25 Q He did not when you saw him on the 3rd?

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A That is correct.

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Did you hear Dr. Albanese say that he had a hematoma on the 5th?

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A I don't agree with his interpretation of the word hematoma. He said there were some red areas there that he thought were of a bleeding nature. That would be synonymous with an ecchymosis rather than a hematoma. A hematoma is an organized collection of pus. An ecchymosis is nonpus with black and blue marks.

Assuming there was a hematoma to the left mandible, would this change your opinion as to the severity of the trauma?

A No, sir.

Q It wouldn't?

A It would not.

Q You would still say the trauma was slight?

A That is correct.

The question was to the bone--if I may refresh your recollection, the question was asked, was there any trauma to the bone. I said if there was it was minimal or mild in nature. He did have a bruise to the soft-tissues overline that bone by virtue of this glancing box effect



Tagliagambe/Cross

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2 hitting him there and sliding off there and hitting  
3 him on the shoulder.

4 Q Would you know if this bruise was a severe bruise?

5 A No, sir.

6 Q Would you say it was a slight bruise?

7 A Yes, I would.

8 Q Did you see any signs of ecchymosis or hematoma  
9 when you examined him?

10 A No, sir.

11 Q Did you have the opportunity when you examined  
12 him to look at the Columbus Hospital emergency  
13 room record?

14 A No, I didn't look at the record itself.  
15 But they communicated with me, sir, as to the  
16 nature of the findings and particularly referring  
17 to the x-ray findings in this case.

18 Q Sir, did they tell you that their diagnosis was  
19 a cystic lesion of the left body of the mandible  
20 and hematoma?

21 A They didn't tell me that. And I don't agree  
22 with it even now because in reading the record,  
23 sir, under "ENT." it states the following: "No  
24 evidence of wound; some tenderness left side lower  
25 mandible."

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There is nothing in the description of the findings that would tell me or indicate to me that there was any ecchymosis or hematoma. But in the diagnosis it read as you have so stated, sir, but that does not correspond to the findings as stated in that record on that sheet.

Well, you have a vivid recollection of Mr. Potenza, do you not?

A I do.

How many longshoremen do you see a day, doctor?

A It varies.

From how many to how many?

A It varies from none and it can vary to ten, twenty, twenty-five.

Thirty?

A Possible.

Sometimes as high as 50 because you have so stated that on the stand of the District Court, have you not, doctor?

MR. LINDEN: I object to that. That's not in evidence in this case.

JUDGE BERNSTEIN: This is cross-examination.

Q Your initial report made out on the 3rd of October



Tagliagambe/Cross

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1  
2 doesn't mention this little pinhead; is that  
3 correct, doctor?

4 A Yes.

5 Q And you brought your office file here today, did  
6 you not, doctor?

7 A That's correct.

8 Q Is it anywhere in your office file?

9 A Yes.

10 Q But yet you remember this because it was so  
11 vivid?

12 A I remember because this case was a very  
13 interesting case. It was discussed with me at  
14 the time. The insurance company called me about  
15 it. So there was some very particular discussion  
16 pertaining to this case which was a little more  
17 than would take place in the ordinary type of  
18 case. This was an unusual presentation and an  
19 unusual pathology and this was discussed at length  
20 and that is why I happened to remember this  
21 particular case more vividly than I would the  
22 ordinary case, which I would have to refresh my  
23 recollection and memory from the records to  
24 discuss in detail.

25 Q When was this discussed with you?

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A It was discussed within a matter of the same week of the accident, sir. After they got our reports and the hospital record, some calls came in on it and the case was discussed from that point on.

Q And you remember when you examined Mr. Potenza that there was a pinhead?

A Yes, sir, I did that.

Q Pin-type lesion?

A Not lesion. I said there was a pinhead opening over the mucosa in the left side of the mandible.

Q Whereabouts on the left side of the mandible? Could you refer to some molar or canine or incisor?

A It was about the middle third of the left mandible.

Q And where would the middle third of the left mandible be?

A Divide it in three parts. It would be in the midpoint.

Q That's somewhere where the canine are located?

A Canines are more anterior.

Q Forward?



Tagliagambe/Cross

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A Yes.

3

Q

So it would be in the neighborhood of the molar?

4

A I don't know which one. I didn't correlate

5

it to any specific molar at that time. It is

6

in the mid third of the left mandible. That is

7

the general region where this is present.

8

Q

And you thought it had no relation?

9

A That's right. It did not appear to have

10

any bearing or relationship to the accident.

11

Q

And you also did not notice any signs of

12

ecchymosis or hematoma; is that correct?

13

A That is correct, sir.

14

Q

Are you claiming, sir, that the hospital was  
wrong in listing hematoma as part of this diag-  
nosis?

16

17

A Well, based upon their own description of

18

their findings--I'm not, you know, trying to

19

criticize anything but from their own findings

20

it doesn't indicate that there was hematoma.

21

They just say tenderness in the left side of the

22

lower mandible. And this was the description of

23

their findings. Now, their conclusion from that

24

finding would be an erroneous conclusion.

25

Q

Then the hospital made a mistake in listing as

Tagliagambe/Cross/Redir.

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part of the diagnosis hematoma, right, yes or no?

A I would say so, if those were their only findings. They didn't put any other findings on the record.

MR. BLAUFARB: I have no further questions.

REDIRECT EXAMINATION BY MR. LINDEN:

Q Whether there was or not a hematoma, doctor, would that make a difference as to the causal relationship that you have given us?

A Not at all.

MR. LINDEN: That's all.

RECROSS-EXAMINATION BY MR. BLAUFARB:

Q You have no experience in neoplastic diseases?

A Of course. I have been a doctor for 34 years. I guess I would have come across neoplastic diseases in the course of one's practice.

Q You limit your practice to general and traumatic surgery, do you not?

A Well, we do see neoplastic conditions in the course of traumatic surgery.

Q When was the last time that you operated on an osteosarcoma?

A On an osteosarcoma?

Q Yes.



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2

A I would say in the last year.

3 Q

What is an osteosarcoma, doctor?

4

A It is a malignant condition of the bone.

5 Q

Where does it usually occur?

6

A In the long bones.

7

Q

The femur?

8

A The femur, humerus.

9

Q

Does it occur in the tibia?

10

A It can occur anyplace.

11

Q

The fibula?

12

A It can. It is rather rare.

13

Q

Does it ever occur in the mandible?

14

A I don't believe I ever seen it in the mandible.

15

Q

What is a fibrostroma?

16

A It is a specifically stated type of growth where there is fibrous tissue and stroma present.

17

18

This is a microscopic finding on examination

19

that the pathologist makes in evaluating the

20

growth specimen.

21

Q

Doctor, do you have a fibrostroma with an osteo-carcinoma?

22

23

A I don't know what relation it has with this

24

case.

25

Does it have any bearing with this particular

1  
2 finding?

3 JUDGE BERNSTEIN: Please answer the  
4 question.

5 Q Do you?

6 A What was the question again?

7 Q Do you have a fibrostroma with an osteosarcoma,  
8 doctor?

9 A Can you have one together?

10 Q Yes, sir.

11 A I guess it is possible. It is not a common  
12 occurrence.

13 Q Where do you usually find a fibrostroma?

14 A In fibrous tissue.

15 Q Is the mandible fibrous tissue?

16 A The mandible is bony tissue..

17 Q And you couldn't find in this bony tissue, could  
18 you, a fibrostroma in this mandible?

19 A Yes. You get fibrous invasions. Surely.

20 MR. BLAUFARB: I have no further  
21 questions.

22 Sir, may I ask one other question?

23 JUDGE BERNSTEIN: Yes. Go ahead.

24 Q Doctor, from the time that you first saw this  
25 pinhead on your first visit until your second



1 Tagliagambe/Recross 131  
2 report and after these many discussions that you  
3 had with the carrier, didn't you think it was  
4 significant to put that note in the record, note  
5 a pinhead of the mucosa in the second report?

6 MR. LINDEN: I object to that state-  
7 ment, the numerous discussions with the  
8 carrier. I object to the word numerous as  
9 well as the tone of his voice, which is  
10 obviously hostile, which I don't think is  
11 necessary.

12 MR. BLAUFARB: I'll rephrase the  
13 question.

14 MR. LINDEN: Thank you.

15 Q Did you think it was significant after discussion  
16 about the pinhead from the time that you sent  
17 your first report out to the time of the second  
18 report to include it in there?

19 A No, sir.

20 Q You did not?

21 A No, sir.

22 MR. BLAUFARB: I have no further questions.

23 JUDGE BERNSTEIN: Mr. Linden?

24 MR. LINDEN: No, sir.

25 JUDGE BERNSTEIN: Thank you, doctor.

1 Robinson/Emp./Dir. 132

2 (Whereupon, the witness is excused  
3 and retires from the witness stand.)

4 JUDGE BERNSTEIN: Call your next  
5 witness, Mr. Linden.

6 MR. LINDEN: I call Dr. Robinson.

7 THEREUPON,

8 DR. HARRY LANE ROBINSON,  
9 with offices at 8 Wayside Lane, Scarsdale, New York,  
10 was called as a witness for and in behalf of the  
11 Employer and Carrier, and being then and there duly  
12 sworn by the reporter, assumed the witness stand and  
13 upon examination testified as follows:

14 DIRECT EXAMINATION BY MR. LINDEN:

15 Q What is your office address, doctor?

16 A 342 East 26th Street, New York 10010.

17 Q Are you a physician duly licensed to practice  
18 medicine in the State of New York?

19 A Yes, sir.

20 Q When and where did you graduate?

21 A Cornell, 1948.

22 Q Do you have Compensation letters for the Com-  
23 pensation Board of New York State?

24 A Yes. I have an XM-5 rating.

25 Q What is that?



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Robinson/Dir.

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2

A Specialist in Anatomical Pathology. ✓

3 Q

And do you specialize in that?

4

A Yes.

5 Q

For how long have you so specialized?

6

A For about 15 years.

7 Q

Will you state your hospital connections and

8

other professional qualifications for the record,

9

please?

10

A Professor of Pathology, Chairman of the

11

Department of Pathology, New York University

12

College of Dentistry.

13 Q

How long have you had that position?

14

A 1959.

15 Q

During the course of your practice did Dr. Albanese ✓

16

refer a specimen to you for pathological exam-

17

ination?

18

A Yes, he did.

19 Q

Did you then submit a surgical pathological report

20

which I will show you as part of the evidence in

21

this record, dated October 10, 1972, case No. 72-1720?

22

A Yes.

23 Q

Is that your report?

24

A Yes.

25 Q

What did you find when the specimen was given to

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you?

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12 Q

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21 Q

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Q

A I found that the specimen consisted of a tumor, to wit: a acanthomatous ameloblastoma, said to be from the left posterior region of the mandible and there was suggestive evidence that it arose from a follicular cyst.

Doctor, what is the cause of the tumor of this sort?

A No one knows the cause of an ameloblastoma. It is completely unknown.

Q When a tumor is found of this nature which has practically destroyed the entire mandible, what medically is done in the manner of treatment?

A Well, the customary treatment today is complete surgical excision. The precise surgical procedure depends on the extent of the lesion but it is important that the entire tumor be removed usually with a margin of adjacent apparently normal tissue.

Q Did you hear the description of the episode as given to the previous physician a few moments ago when you were sitting in the room?

A Yes, I did.

Q If you assume that trauma as having occurred,



Robinson/Dir.

135

1  
2 do you have an opinion within a reasonable degree  
3 of medical certainty as to whether such trauma  
4 could or did in anyway affect or aggravate the  
5 tumor?

6 A Well, I can't conceive of--as the previous  
7 doctor stated--of trauma fracturing a diseased  
8 bone. I was informed by Dr. Albanese that there  
9 was no evidence of fracture. He did describe the  
10 relationship of the lesion to the bone at the  
11 time of surgery. The tumor as described by him  
12 had, completely destroyed the upper portion of the  
13 mandible so that it was covered by oral mucosa.

14 I think it is important to point out that  
15 the nature of this man's lesion was only deter-  
16 mined after the pathological examination. So  
17 that once this was established then of course  
18 the patient could be properly treated.

19 Q Do you think that the trauma accelerated in any-  
20 way the condition of this tumor?

21 A I know of no reason to believe that trauma  
22 would accelerate the tumor. The tumor obviously  
23 existed and I think it is quite fortunate for this  
24 patient that he happened to sustain some trauma  
25 so that his tumor was recognized and he could get

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proper treatment.

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Q Why was it fortunate, doctor?

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Q Is it uncommon for episodes that apparently had no relationship to the existing pathology to draw the attention of the individual to the fact that there is underlying disease?

A That's very common. He as I said was very fortunate that he was x-rayed and this previously silent lesion was therefore discovered.

MR. LINDEN: That's all.

21

CROSS-EXAMINATION BY MR. BLAUFARB:

22

Q Doctor, you used a word before, "previously silent."

23

What do you mean by previously silent?

24

A Well, I'll just say silent.

25

Q Doctor, do you believe from your pathological



1 examination, sir, that this lesion did not bother  
2 Mr. Potenza before this incident occurred?

3 A I have no opinion. I did not examine Mr.  
4 Potenza. I examined the surgical specimen. I  
5 was informed that--by Dr. Albanese that he had no  
6 knowledge of having a diseased jawbone.  
7

8 Q Now, doctor, from your knowledge of this type of  
9 lesion, the lesion is covered by some type of  
10 membrane, is it not?

11 A Well, the lesion is of an intraosteolar  
12 structure in about 95% of the cases; as it was  
13 in the case of Mr. Potenza, it grows and ex-  
14 pands and destroys bone. It had destroyed so  
15 much bone that the top of the mandible--the bone  
16 had been completely destroyed and it was only  
17 covered by oral membrane. This was the des-  
18 cription given to me by Dr. Albanese as he found  
19 it at the time of surgery.

20 Q Would you say that the membrane looked like some-  
21 thing on the inside of an egg?

22 A This is oral membrane.

23 Q What is that, oral membrane, doctor?

24 A The lining of the oral cavity.

25 Q Is this usually continuous without any type of

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laceration or opening?

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A Yes. The oral membrane, I mean, except for the orifices of the salivary gland ducts, there is obviously--until it is traumatized it is a continuous membrane.

7

Q

Well, was there any trauma to the oral membrane?

8

A I don't know.

9

Q

Was it reported to you by history that there was trauma to the oral membrane?

10

11

12

A I didn't get any history in my pathological request form.

13

Q

Well, doctor--

14

15

16

A (Interp'g) I mean obviously in order to obtain the specimen, Dr. Albanese had to excise the lesion.

17

Q

Right.

18

19

The tissue that you saw was a cystic tissue, was it not, doctor?

20

21

22

Q

A Yes. These tumors are frequently cystic. And it was not an oral membrane that you pathologically examined?

23

24

25

Q

Doctor, what is a follicular cyst?



1  
2 A A follicular cyst which is a cyst which  
3 occurs in relation to the crown of a tooth, it is  
4 a very common lesion that cannot be distin-  
5 guished with certainty on radiological grounds  
6 and clinical grounds frequently from an amelo-  
7 blastoma and frequently the lining of a follicular  
8 cyst can give rise to an ameloblastoma so that  
9 the lesion--the follicular cyst is fed--clinically,  
10 for example, Dr. Albanese was under the impression  
11 that he was dealing with a follicular cyst and it  
12 was only when he got my pathological report that  
13 the true nature of the lesion was apparent.

14 Q And it was some kind of a well-differentiated  
15 benign neoplasm with no histologic evidence of  
16 invasion, right?

17 A No, I don't think that's a fair description  
18 of an ameloblastoma.

19 Q What is the definition of the other word that you  
20 said before.

21 A That's purely a description of the adjective.  
22 And acanthomatous refers to the histological  
23 morphology. It has no bearing on the biological  
24 behavior.

25 Q What does it mean?

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A It means that there are squamous cells--

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Q (Interp'g) Well differentiated?

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MR. LINDEN: Please don't interrupt in  
the middle of the sentence.

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JUDGE BERNSTEIN: Do you have more to  
answer, doctor?

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THE WITNESS: Well, I believe the  
attorney wants me to define acanthomatous.

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Q Is ameloblastoma a malignant neoplasm?

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A It is an oversimplification to dichotomize  
between benign and malignant tumors. Some tumors  
are more benign than others, some are more mal-  
ignant than others.



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1  
2 And ameloblastoma is an example of such a  
3 tumor that it cannot be neatly categorized as a  
4 benign tumor because the number of documented  
5 instances of metastasis have been exceedingly  
6 few. However, it is a locally aggressive tumor  
7 so that if it is aggressive it is persistent in  
8 its locally destructive fashion and it has been  
9 responsible for death of patients on occasion.  
10 So it is a much more serious problem than other  
11 types of benign tumors.

12 JUDGE BERNSTEIN: What is a metastasis?

13 THE WITNESS: It is a spread of a mal-  
14 ignant tumor at a distance from its origin.

15 JUDGE BERNSTEIN: Thank you.

16 Q Doctor, if you traumatize the oral mucosa in and  
17 around a ameloblastoma, does this aggravate the  
18 ameloblastoma?

19 MR. LINDEN: I object to the question.

20 There is no evidence that the tumor in this  
21 case was traumatized. The tumor is in the  
22 bone.

23 Q The only thing separating the top of the tumor  
24 from the gum was oral membrane, right?

25 A That's the way the surgeon described it.

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JUDGE BERNSTEIN: I'll allow that question.

Q Would you answer my question, doctor, please?

A Would you repeat the question?

MR. BLAUFARB: Read the question back.

(Whereupon, the pertinent question was read by the reporter.)

A Could you be more specific? I don't know what you mean by the term ameloblastoma?

Q I'll phrase it this way, doctor.

Assuming, if you will, that you have an ameloblastoma and the only thing separating it from the oral cavity is this oral membrane and that the jaw in this area is traumatized with sufficient force to cause the gum to exude material and further that the jaw is traumatized with sufficient force to cause a hospital to make a diagnosis of a hematoma, would you say, sir, based upon your experience and based upon reasonable medical certainty that the trauma aggravated this ameloblastoma?

MR. LINDEN: I object to that, unless it is described that there were no lacerations in this claimant's mouth, that the only



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1 point at which there was any evidence of a  
2 break was in this entrance from the oral  
3 cavity in the area below and immediately  
4 following this it was noted that there was  
5 a mucous-like yellow serous discharge.  
6

7 JUDGE BERNSTEIN: Mr. Blaufarb?

8 MR. BLAUFARB: If it please the Court,  
9 counsel now wants us to do the same thing  
10 that he was doing on cross-examination of  
11 my physician. There are certain facts here  
12 in issue. There is a dispute as to the facts,  
13 actually as to what transpired subsequent to  
14 the incident. On this hypothetical I have  
15 put to the doctor a question, the only facts  
16 we are certain of in actual fact are the  
17 facts that have been stated by the witnesses.  
18 Now, you heard--we have all heard Dr. Albanese  
19 testify; Dr. Tagliagambe testified about  
20 some pin mark. The only thing we are really  
21 sure of, if it please the Court, as to what  
22 the hospital says, there was hematoma, Dr.  
23 Albanese saw some material oozing, the  
24 claimant saw some material oozing. These  
25 are the facts that were put to the witness.

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JUDGE BERNSTEIN: Isn't it a fact that there were also no lacerations?

MR. BLAUFARB: There could have been lacerations. Dr. Albanese described it in many ways. He said it was like a little laceration. It was extravasation of blood in the surrounding tissues. There was a little hematoma.

MR. LINDEN: Judge Bernstein, that is not the fact--

MR. BLAUFARB: (Interp'g) This is a fact.

MR. LINDEN: Please caution him to let me finish the sentence.

What occurred in this case, Dr. Tagliagambe found a--and he stated on the record that the hospital does not describe any trauma in this man's mouth at all--nothing.

I submit to you the testimony of Dr. Albanese, when you look at it and review it in its fullness, although he dreaded the idea of making the admission, finally admitted there was no laceration in this man's mouth. All he saw was the opening and



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1 the opening was the same opening that  
2 Dr. Tagliagambe saw and it fully confirms  
3 and is consistent with what the claimant  
4 stated by noticing a serous exudate following  
5 this when he took the bridge out of his  
6 mouth and the bridge wasn't disturbed in  
7 his mouth.  
8

9 So that the question is unfair and is  
10 not based on this record at all.

11 JUDGE BERNSTEIN: Thank you.

12 I'm not going to make a finding of fact  
13 on this right now. I'm going to permit you  
14 to ask your question and if you wish to ask  
15 the same question you may do so.

16 MR. BLAUFARB: Would the reporter read  
17 the question back?

18 (Whereupon, the pertinent question was  
19 read by the reporter.)

20 A I assume by your use of the word aggravate  
21 you mean make worse?

22 Q Make worse.

23 A The answer is no.

24 Q Can anything make an ameloblastoma worse, doctor?

25 MR. LINDEN: I object, on the grounds

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1  
2 that we are not faced with anything.

3 JUDGE BERNSTEIN: Objection overruled.

4 I would like to hear his answer.

5 Q Can anything make an ameloblastoma worse?

6 A I know of no way to change the potentiality  
7 of an ameloblastoma. No.

8 Q Who is James Ewing?

9 A The Professor of Pathology at Cornell Medical  
10 School and for many years Chief of Pathology at  
11 Memorial Hospital and a very distinguished  
12 physician in the city.

13 Q Doctor, he postulated some criteria for aggra-  
14 vation of tumors, did he not?

15 A Specifically what are you reading? He dis-  
16 cussed--I think it is preferable to discuss  
17 specific neoplasms because different neoplasms  
18 behave differently.

19 Q Doctor, Dr. Ewing was your professor, was he not?

20 A No. Unfortunately he died or certainly  
21 left the department. Dr. John Kidd was Chairman  
22 of the Department.

23 Q Did you learn Ewing's postulates when you were in  
24 medical school?

25 A Ewing's postulates?



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Q Isn't that what they are called?

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A I never heard of Ewing's postulates. Perhaps I'm familiar with the thought but I'm not familiar with that designation.

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MR. LINDEN: First off--

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Don't answer the question, doctor.

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--before a witness can be cross-

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examined on what another witness says, it must be produced in the form of a pamphlet or publication or book that can be used to confront the witness.

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2 MR. BLAUFARB: How do you know I don't  
3 have one?

4 MR. LINDEN: Please don't interrupt.  
5 I'm getting tired of that.

6 Secondly--

7 JUDGE BERNSTEIN: (Interp'g) Please  
8 don't interrupt.

9 MR. LINDEN: --he's asked the doctor to  
10 assume there was no pathology at this point  
11 before. It is not only that it is not  
12 supported by the evidence, it is directly  
13 to the contrary because we know the pathology  
14 this man had in his jaw the day before this  
15 episode had practically destroyed his entire  
16 jaw.

17 On that basis the question, I submit,  
18 sir, is improper.

19 JUDGE BERNSTEIN: Mr. Blaufarb?

20 MR. BLAUFARB: I'll withdraw the  
21 question.

22 Q Doctor, let me ask you this.

23 Medicine is not an exact science, is it not?

24 A It is generally acknowledged not to be.

25 Q Different practitioners have different views on



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various things in medicine; is that correct?

3

A I would say some areas are controversial and

4

some areas are not controversial.

5 Q

One of the most controversial is neoplastic diseases;

6

is that correct, doctor?

7

A Certain aspects of neoplastic diseases; other

8

aspects it is quite general agreement.

9 Q

And one of the most controversial subjects in

10

neoplastic diseases is whether or not trauma

11

aggravates or initiates neoplastic diseases; is

12

that correct, doctor?

13

A Not in my opinion, sir.

14 Q

You don't believe they are aggravated; is that

15

correct, doctor?

16

A The relationship between trauma and neoplastic

17

diseases is extremely specious and undocumented

18

in my opinion.

19 Q

Doctor, did Dr. Ewing document any--

20

MR. LINDEN: (Interp'g) I object to

21

anything Dr. Ewing said or did unless he

22

has the specific statements of what Dr.

23

Ewing said in the form of an accepted piece

24

of literature. Any other cross-examination

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of this sort is not permissible.

1 Robinson/Cross

2 MR. BLAUFARB: He's not letting me finish  
3 the question.

4 I'll withdraw the question.

5 Q Let me ask you this, doctor.

6 There are two schools of thought on this.  
7 There is one school of thought that feels that  
8 trauma can aggravate a tumor and there is another  
9 school of thought that says there is not--

10 MR. LINDEN: (Interp'g) I object to  
11 that. There is no evidence in this record  
12 that there are two schools of thought or if  
13 I may say in my opinion, there are no such  
14 schools. There may be differences of opinion  
15 of doctors. Lacking evidence of schools  
16 of thought this question means nothing.

17 JUDGE BERNSTEIN: It seems that we  
18 are getting a lot of medical testimony  
19 from lawyers.

20 Mr. Blaufarb, it doesn't appear to  
21 be any evidence of two schools of thought  
22 in this record.

23 MR. BLAUFARB: I'm asking this doctor  
24 on the question of credibility as to whether  
25 he believes there are two schools of thought.



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MR. LINDEN: It's what he's asking him.

He's asking whether he agrees with one or the other schools of thought.

Q Are there two schools of thought in that area?

A I 'm sure that you would probably find physicians that believe this. I personally don't know any, nor do I know of any authoritarian reference which so states. So that if you found someone who advocated this point of view I would say there is a great paucity of objective evidence to substantiate his opinion.

Q Is it not a well-known surgical fact and a pathological fact that when a biopsy is made of a tumor, a very highly malignant tumor, it speeds up the metastasis; is that not a fact?

A No, it is not a fact. It is a widespread misconception.

Q And there is no way that a tumor can be aggravated by a trauma?

MR. LINDEN: I object to that. He did not say that.

JUDGE BERNSTEIN: No, he did not say that.

Q Is there any way that a tumor can be aggravated

1 Robinson/Cross

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2 by trauma?

3 MR. LINDEN: I object to that.

4 JUDGE BERNSTEIN: I would like his answer.

5 I think the doctor is fully qualified to  
6 answer the question.

7 MR. LINDEN: It is up to you.

8 A If example a highly malignant tumor such as  
9 an ameloblastoma is inadequately excised and not  
10 followed promptly by adequate treatment, I can  
11 conceive of that time of inadequate surgery as  
12 aggravating the condition. Yes.

13 I've seen some examples of that type of  
14 thing. I believe, if I may interject, what is  
15 at issue really is the relationship between single  
16 trauma and neoplasm--neoplasia rather--and I  
17 don't feel there is any relationship, nor do I  
18 know of any documentary evidence that there is.

19 Q Doctor, you're not an oral surgeon, are you?

20 A No, sir, I'm not.

21 MR. BLAUFARB: I have no further questions.

22 JUDGE BERNSTEIN: Mr. Linden?

23 MR. LINDEN: No, sir.

24 JUDGE BERNSTEIN: Thank you, doctor.

25 The witness is excused.



1 Sage/Emp./Dir.

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2 (Whereupon, the witness is excused and  
3 retires from the witness stand.)

4 JUDGE BERNSTEIN: Call your next witness,  
5 Mr. Linden.

6 MR. LINDEN: I call Dr. Sage.

7 THEREUPON,

8 DR. HAROLD H. SAGE,

9 with offices at 566 First Avenue, New York, New York,  
10 was called as a witness for and in behalf of the  
11 Employer and Carrier, and being then and there duly sworn  
12 by the reporter, assumed the witness stand and upon  
13 examination testified as follows:

14 DIRECT EXAMINATION BY MR. LINDEN:

15 Q Are you a physician duly licensed to practice  
16 medicine in the State of New York?

17 A Yes.

18 MR. BLAUFARB: If it please the Court,  
19 I will concede that Dr. Sage is a very  
20 qualified surgeon, has a specialty in surgery  
21 and is a diplomate in Radiology, a diplomate  
22 of the American Board of Surgery, a general  
23 and traumatic surgeon, a Fellow of the  
24 American College of Surgeons, a Fellow of the  
25 American College of Radiology. And whether

1 Sage/Dir. 154  
2 or not he recalls saw my father in consul-  
3 tation.

4 THE WITNESS: Except that I'm not a  
5 general and traumatic surgeon.

6 MR. LINDEN: I thank Mr. Blaufarb for  
7 that concession.

8 Q Please state your qualifications and experience,  
9 doctor.

10 A I'm Associate Professor of Surgery at New  
11 York University Medical Center and Codirector of  
12 the tumor service at the Medical Center in the  
13 department of surgery--this includes University  
14 Hospital, V A Hospital and Bellevue. I'm a  
15 member of the American Association of Cancer  
16 Research, of the American Association of Clinical  
17 Oncology--that's tumor specialist--and a member of  
18 many societies relating to tumor and cancer. I'm  
19 a head and neck surgeon, particularly that's my  
20 surgical specialty but I'm also a consultant  
21 tumor surgeon in other areas.

22 JUDGE BERNSTEIN: Thank you, doctor.

23 A (Cont'g) I'm also Associate Professor of  
24 oral diagnosis at New York University School  
25 of Dentistry.



1 Sage/Dir. 155

2 JUDGE BERNSTEIN: That's quite an array  
3 of qualifications. Thank you.

4 Q At the request of the Federal Insurance Company  
5 did you have occasion to examine Mr. Potenza  
6 and submit a two-page report dated November 14, 1972?

7 A Yes.

8 MR. LINDEN: That report, sir, is part  
9 of the administrative file that is in evidence  
10 in this case.

11 JUDGE BERNSTEIN: Thank you, Mr. Linden.

12 Q Did you also, doctor, hear the description of the  
13 trauma as discussed in the hypotheses and asked  
14 of the two witnesses as you sat here this after-  
15 noon?

16 A Yes.

17 Q I want you to tell us what your examination  
18 revealed.

19 Before I come to that, doctor, if you were  
20 to testify, doctor, as to the data that you have  
21 seen as set forth in your report, would it be  
22 as you have it set forth in your report?

23 A Yes.

24 Q Tell us what you found in your examination.

25 A My examination on November 7, 1972 revealed

- 1 Sage/Dir. 156
- 2 a palpable swelling of the left horizontal ramus
- 3 of the mandible at the angle; there was a general
- 4 opening in the area with some irregular and
- 5 necrotic tissue visible in the bone; there were
- 6 no significantly enlarged lymph nodes in the
- 7 neck and the remainder of the physical examination
- 8 of the body was negative.
- 9 Q Now, doctor bearing in mind what has transpired
- 10 in this case, what you saw, what was the diag-
- 11 nosis in this case?
- 12 A Ameloblastoma of the mandible.
- 13 Q Bearing in mind the history of accident as des-
- 14 cribed, doctor, do you have an opinion which you
- 15 could state with a reasonable degree of medical
- 16 certainty as to whether there is any causal re-
- 17 lationship, directly, indirectly, by aggravation
- 18 or otherwise, between the episode, the tumor which
- 19 was diagnosed on October 2 and 3 of 1972, the
- 20 operative procedure that was performed by Dr.
- 21 Albanese in his office on October 5, 1972 and the
- 22 operative removal of the tumor that was per-
- 23 formed at the Columbus Hospital on November 15, 1972?
- 24 A I have an opinion.
- 25 Q What is your opinion?



Sage/Dir.

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A Yes.

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My opinion is that there is no causal relationship between the accident of the 2nd of October, 1972 and the tumor in this case.

6

Q

Tell us why you came to that conclusion, doctor.

7

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A First, we ought to make clear what the nature of the ameloblastoma is.

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Ameloblastoma is a tumor which develops very slowly in the mandible and in the situation such as we see in this case as evidenced by x-ray examination and the operation, the evidence indicates that this tumor would have to have been present for many years. It might have been as many as 20 or 30 years.

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And secondly, the x-ray evidence alone indicates the extent of this tumor prior to the accident and to read the findings of the x-rays, there was an osteolytic lesion of the horizontal ramus of the mandible just anterior to the angle with marked thinning of the lower cortical outline.

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This indicates that this trauma which had been present for many years had destroyed the entire bone virtually leaving only the lower

Sage/Dir.

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2 border still in tact; the upper border, which is  
3 the border that would be protruding through the  
4 mouth, had already broken through the bone.  
5 There was no residual bone left there. There is  
6 tumor now. This is the situation of the tumor  
7 prior to the accident. We have an accident and  
8 obviously we don't need to consider what caused  
9 it, the tumor but we have to consider what are  
10 in my specialty the meaning of the terms aggra-  
11 vation or acceleration of the tumor or in another  
12 way to also consider whether or not the hospital-  
13 ization and operations were necessary because of  
14 the tumor. In other words, you can have aggra-  
15 vation and acceleration of the tumor or you can  
16 conceivably have something which would nec-  
17 essitate a procedure even though it had not  
18 done anything more to the tumor.

19 Now, what could have happened to a tumor by  
20 such a procedure that would perhaps necessitate  
21 some immediate procedure that would not have  
22 been necessary otherwise. The only thing that  
23 would have happened was a fracture. There was  
24 no fracture. The x-ray didn't reveal any  
25 fracture. There would be no question of



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2 fracture if there had been a fracture. There's  
3 been no suggestion of a fracture from anyone  
4 here. So from this point of view, from the non-  
5 neoplastic point of view--the point of view of  
6 some other need for doing something, there was  
7 no need in this case. This was an entirely tumor  
8 problem.

9         So we come to what could have happened to  
10 the injury that might have altered the tumor,  
11 aggravated or accelerated it. You don't have  
12 to even postulate possibilities of trauma being  
13 involved here because there was no change in the  
14 tumor. When a tumor changes it does one of two  
15 things: it grows more rapidly or it spreads.  
16 There is no spread in this case and, as a matter  
17 of fact, which is also part of the natural  
18 history of this tumor, this tumor spreads ex-  
19 ceedingly rarely. There are just a few documented  
20 cases of it. So you don't have to worry about  
21 this tumor like you worry about a lung tumor or  
22 a bowel tumor or other tumors that are in the  
23 malignant category. This is a localized tumor  
24 mass.

25         The only other possibility that you would

1 Sage/Dir. 160

2 have to consider is was there anything that happened  
3 to this tumor mass in the way of growth and the  
4 answer is no.

5 It is inconceivable that this type of tumor  
6 would have changed--could have changed. There is  
7 no evidence of any change. And you didn't--you  
8 can't conceive of any change happening to this  
9 particular tumor from anything that happened here  
10 or in any of the time intervals here--even longer  
11 time intervals.

12 This is essentially a very inactive type  
13 of tumor in the respect of growth ranges.

14 JUDGE BERNSTEIN: What is the basis for  
15 your conclusion that this tumor hadn't changed  
16 rapidly? How can you conclude that?

17 THE WITNESS: You would know from the  
18 histology.

19 If there was a rapid dividing tumor the  
20 histology would have shown that. At the op-  
21 eration it would have shown that. It would  
22 have been a change in the dimensions of the  
23 tumor.

24 JUDGE BERNSTEIN: What are the things that  
25 you would have found to show the change?



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2 THE WITNESS: Either clinically the  
3 tumor would have gotten bigger. There is no  
4 evidence anywhere here of the tumor getting  
5 bigger; no one even suggested it.

6 JUDGE BERNSTEIN: Is there any evidence  
7 that it didn't get bigger?

8 I'm not a doctor. I'm trying to  
9 understand it.

10 THE WITNESS: It was growing. The ev-  
11 idence that it didn't get bigger is the  
12 absence of evidence that it got bigger. If  
13 the x-ray showed it there, what you saw on  
14 x-ray is exactly what was there before the  
15 injury. The x-ray was taken at the time  
16 of the injury. There is no possibility that  
17 in minutes or seconds or hours or days that  
18 it can change a tumor. It doesn't happen  
19 that way. So what you see in the x-ray on  
20 the day of this accident was exactly the  
21 size of the tumor. You know that size.  
22 There was no change of that tumor size to  
23 the time of the operation.

24 It would have been inconceivable to me  
25 that it could have occurred at all anyway.

Sage/Dir.

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This tumor doesn't behave like that; never behaves like that. I have never heard or read of any tumor--that ameloblastoma--that is altered in size by virtue of an injury. So from the theoretic and practical point of view there is no question about it.

JUDGE BERNSTEIN: Have you heard or experienced any ameloblastoma that has been changed in anyway by an injury?

THE WITNESS: No, I have never seen any-one report or have I heard of anyone at anytime and I have had considerable experience in operating on those tumors. This tumor behaved like all the others, exactly. It's a break through the bone that was there before the injury and that's characteristic of it. That's the way they behave. That's when they finally require treatment. Takes years until they do that. But at this time it is at the stage where they have grown through the bone at this point with the secretion, which is typical.

There is a little opening and a little material coming out. That's what you find



1 Sage/Dir./Cross

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2 in the ones that have broken through. That's  
3 the usual average typical story, unrelated  
4 to any traumatic episode.

5 JUDGE BERNSTEIN: So in your opinion,  
6 doctor, if there was secretion shortly after  
7 this accident it was coincidental?

8 THE WITNESS: Absolutely. This is the  
9 way they all present. It is relatively  
10 asymptomatic until a later stage, until when  
11 it would fracture or produce a big laceration  
12 in the mouth, which is the next stage in its  
13 natural history. But it is in the early  
14 stage in which they present a little opening  
15 or secretion which comes out.

16 JUDGE BERNSTEIN: Thank you.

17 Go ahead, Mr. Linden.

18 MR. LINDEN: I have no further questions.

19 CROSS-EXAMINATION BY MR. BLAUFARB:

20 Q Doctor, if I had a water blister on my hand and I  
21 smacked it with a stick, would it break?

22 MR. LINDEN: I object to that. It is  
23 immaterial.

24 JUDGE BERNSTEIN: I'm going to allow  
25 some latitude on cross-examination. I would

- 1 Sage/Cross 164
- 2 like him to develop this line of questioning.
- 3 A Yes.
- 4 Q Sure it would. And if I had an ameloblastoma in
- 5 my gum and I didn't know it was there and I got
- 6 whacked on the jaw, would it break?
- 7 MR. LINDEN: I object to that.
- 8 This ameloblastoma was not in the gum.
- 9 It was in the bone.
- 10 MR. BLAUFARB: I withdraw that.
- 11 Q Doctor, where was the ameloblastoma here?
- 12 A In the bone; in the mandible.
- 13 Q Was there any part of the bone left, the top
- 14 part of the mandible?
- 15 A There was complete erosion but not fracture.
- 16 They are entirely different. They are not to
- 17 be confused.
- 18 MR. LINDEN: Well-
- 19 JUDGE BERNSTEIN: (Interp'g) I would
- 20 like one person to talk at one time and when
- 21 he's completed with what he's saying I would
- 22 like someone else to then at that time and
- 23 not sooner speak.
- 24 Please continue, doctor.
- 25 A I said in answer to that, the x-ray showed



Sage/Cross

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2 and I read the wording of the radiologist who  
3 reported it. That's the official report. Com-  
4 plete erosion of the upper cortical outline.  
5 Then I added that erosion of the cortical outline  
6 is not fracture. They are entirely separate  
7 entities. There is no difficulty in distinguish-  
8 ing them. Any radiologist can tell the difference  
9 between cortical erosion and fracture. This was  
10 cortical erosion. That means the tumor has just  
11 gone right through the bone but not fractured it.

12 Now, trauma produces fracture, not cortical  
13 erosion. There is no cortical erosion produced  
14 by trauma. The only thing trauma can do is to  
15 fracture it. There was no fracture. There has  
16 never been any suggestion by anybody in any report  
17 or--of any fracture.

18 JUDGE BERNSTEIN: Thank you, doctor.

19 Q Doctor, this erosion that you noted, this means  
20 that the tumor was covered by what?

21 A It means that it was not covered by bone.  
22 That's all that erosion means.

23 Q And there was no bone on top, right?

24 A Exactly.

25 Q And it was like this water blister that I spoke

1 Sage/Cross 166  
2 of before, correct? It was a squishy mass of  
3 material; is that correct, doctor?  
4 A I couldn't reach the same feeling that this  
5 is the way to describe a tumor as a water blister.  
6 Q Is it like a water blister?  
7 MR. LINDEN: I object to the character-  
8 ization.  
9 JUDGE BERNSTEIN: Let's allow him to  
10 question the witness. I think the witness--  
11 MR. BLAUFARB: (Interp'g) Believe me,  
12 he's better able to take care of himself  
13 than you are, Mr. Linden.  
14 MR. LINDEN: If you ask questions that  
15 are silly I'm going to object to them.  
16 Q I show you the Joint Exhibit No.1, doctor, and  
17 ask you, sir, whether you got that x-ray report?  
18 Do you have a copy of the x-ray report with  
19 you?  
20 A Yes.  
21 Q May I see it, sir?  
22 A Yes.  
23 (Handing.)  
24 MR. BLAUFARB: I offer that in evidence.  
25 It is not in the hospital record.



1 Sage/Cross

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2 MR. LINDEN: It is in the hospital  
3 record, Mr. Blaufarb.

4 JUDGE BERNSTEIN: Mr. Linden, please.

5 MR. LINDEN: Mr. Bernstein, it gets a  
6 little ridiculous.

7 THE WITNESS: It also states specifically  
8 at the beginning of that x-ray report that  
9 there is no fracture present.

10 JUDGE BERNSTEIN: Do you have any ob-  
11 jection to submitting this, assuming it's  
12 already been in evidence?

13 MR. LINDEN: No.

14 JUDGE BERNSTEIN: Please mark it.

15 (Whereupon, the radiological report,  
16 dated 10/2/72 was marked Claimant's  
17 Exhibit 1 in Evidence by the reporter  
18 as of this date.)

19 Q Doctor, so that I understand this lesion, this  
20 tumor, on the bottom there was bone, correct?

21 A There was a margin of bone on the bottom.

22 Q On the bottom?

23 A Yes.

24 Q On the top what separated the tumor from the oral  
25 cavity?

Sage/Cross

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A Mucous membrane.

3 Q

Tissue?

4

A Mucous membrane.

5 Q

Mucous membrane?

6

A Yes. There is a very thin layer of mucous

7

membrane. Mucous membrane is what you feel on top

8

of your gum, as you call it, or gingiva, as I call

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it; a very thin layer of tissue.

10 Q

And, sir, if I had a blister inside my mouth

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from something hot and I smacked it hard, in some

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way would this blister break if I smacked it

13

hard enough?

14

A I suppose so.

15 Q

And conversely, sir, if this tumor were hit would

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it break?

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MR. LINDEN: I object to that. There is

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no proof that the tumor was hit.

19

A No, it wouldn't.

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JUDGE BERNSTEIN: I'll allow him to

21

answer that.

22

MR. LINDEN: All right.

23

A No, it wouldn't.

24 Q

And this thin layer of mucous membrane would hold

25

up, is that correct, and it wouldn't break?



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A Are you asking me if it is possible to break  
the mucous membrane?

3

4

Q

Yes, sir.

5

A Sure it is.

6

Q

And can trauma sufficient to cause a hematoma  
break the membrane?

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A The two aren't related in anyway.

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Trauma sufficient to cause a fracture would  
break the membrane but conversely trauma insuffic-  
ient to cause a fracture would not have done any-  
thing to that tumor because that's where the tumor  
is, in the bone.

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Secondly--

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May I expand on this?

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--the hematoma, I believe--I think that's  
what's confusing here--is what the hospital  
probably meant by hematoma is that the contusion  
that's described outside, that's in the cheek.  
That has nothing to do with the bone of the  
mandible because if there were findings of hema-  
toma in the oral cavity they would have been  
described as lacerations of the membrane, bleeding  
of the membrane--all the things that would cause  
a hematoma. You can't have a hematoma in the

1 Sage/Cross

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2 tissues of the gingiva without having some bleeding;  
3 whereas, in the cheek, the evidence of the bleed-  
4 ing in the cheek is the contusion and that's what  
5 they meant by hematoma.

6 JUDGE BERNSTEIN: So that you're testifying  
7 that if the hospital concluded there was  
8 a hematoma it was not a hematoma in the  
9 sense--

10 THE WITNESS: (Interp'g) Not overlying  
11 the mandible.' It was the hematoma of the  
12 cheek which is in this region of the tissue,  
13 outside the mandible. The mandible, there  
14 was no description of anything in the man-  
15 dibular area of trauma.

16 JUDGE BERNSTEIN: Okay.

17 Q Doctor, you didn't see this man on the 2nd of  
18 October, did you not?

19 A No.

20 Q You didn't see him until almost a month later;  
21 is that correct?

22 A Yes.

23 Q And this was after a procedure had been done on  
24 this jaw, correct?

25 A Absolutely.



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Sage/Cross

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2 Q

So you didn't know whether there was hematoma  
inside or outside at this moment, do you, sir?

3

A You're asking me the--I'm asking what the  
original description means. We are both making  
our interpretations based on the original des-  
cription I've just given you.

4

You mean even if it differs with yours?

5 Q

I'm going to ask you again.

6

If I had a blister on the inside of my mouth,  
could a blow to the jaw break the blister?

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JUDGE BERNSTEIN: I think he answered  
the question.

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MR. BLAUFARB: I don't recall the answer.

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JUDGE BERNSTEIN: I think he said yes.

12

A I said I suppose so.

13

MR. BLAUFARB: I have no further questions.

14

MR. LINDEN: I have no further questions.

15

MR. BLAUFARB: Thank you.

16

JUDGE BERNSTEIN: Doctor, just a moment.

17

Off the record.

18

(Discussion off the record.)

19

JUDGE BERNSTEIN: No further questions.

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(Whereupon, the witness is excused and

21

retires from the witness stand.)

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JUDGE BERNSTEIN: Mr. Linden, do you have any further witnesses?

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MR. LINDEN: No, sir, I do not.

5

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JUDGE BERNSTEIN: Do you have anything further to bring before us?

7

MR. LINDEN: I do not.

8

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JUDGE BERNSTEIN: Mr. Blaufarb, do you have anything further?

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MR. BLAUFARB: No.

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But I would like to have the opportunity to submit a memorandum with respect to the relationship between trauma and neoplastic diseases.

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There is a lot of law in this state, in New York State before the Compensation Board, where they have held a definite relationship.

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JUDGE BERNSTEIN: I would welcome receiving your brief on the subject and anything else that you feel would be helpful in helping us to decide this case.

23

24

I would also welcome Mr. Linden's brief.

25

MR. LINDEN: Yes.



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JUDGE BERNSTEIN: Do either of you wish to make oral argument?

3

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MR. BLAUFARB: If it please the Court, my oral argument will be limited to one thing.

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There is an issue of fact, actual fact, as to whether or not from the medical testimony--I'll call it a blister--whether or not this blister broke open by reason of trauma or not.

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On one hand you have a treating dentist, an oral surgeon, who was there at the start, as opposed to the experts who sit in the ivory tower and say it can't be. As a matter of fact, Dr. Robinson, the pathologist that was called had been originally retained, so to speak, indirectly by the plaintiff through Dr. Albanese. The record will reveal that the pathologist's report had been submitted to Dr. Robinson from Dr. Albanese. I have no quarrel with what Dr. Robinson set forth since Dr. Robinson is--was not the treating physician. The only treating practitioner we had here was Dr. Albanese who

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stated unequivocally in his opinion medically and dentally the tumor had eroded the bone above so that it was covered with bone only on the bottom; it was like a blister.

And I think it is quite obvious that this blister was aggravated by the trauma.

Dr. Albanese also stated that he probably could have gone on for the rest of his life not being bothered by this. I think all practitioners agree that this is a very slow-growing tumor and it is strange that whenever you advance a matter in any court of law or before an administrative board as to whether or not the tumor is aggravated or a later condition is aggravated or any type of aggravation, the classic defense--the classic defense is that it is coincidental and that's No.1 and No.2, we did him a favor. No invasion of the human body is a favor.

Before we had our statistics and before we had our mass exchange of medical information I suppose Mr. Potenza would have lived the rest of his life with the mass in his jaw



1  
2 and even not known that he had been injured.

3 Legally there is legal basis in New  
4 York State, at least with respect to trauma -  
5 aggravating tumors--I won't review here the  
6 testimony, but I will merely say that it is  
7 my understanding of the law that there is  
8 evidence within this state to sustain the  
9 finding. Since the statute here is in  
10 derogation of the common law it should be  
11 strictly included and I think there should be  
12 a finding for the claimant since he has  
13 sustained his burden of proof. He does not  
14 have to sustain his burden by a fair pre-  
15 ponderance, just sustain his burden. The  
16 statute has to protect the longshoremen and  
17 harbor workers. It is a good thing. It is  
18 a sociological statute and I believe that  
19 it should be applied in its strictest sense.

20 My reading of the statute, I believe  
21 that so long as there is a relationship  
22 demonstrated I believe his employer should  
23 be responsible.

24 I have nothing further.

25 JUDGE BERNSTEIN: Thank you, Mr. Blaufarb.

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Mr. Linden?

MR. LINDEN: I find it difficult and  
needless to engage in discussion concerning  
what the law is supposed to do. We all know  
what it is supposed to do. That's not at  
issue here.

The statement that there is supposed to  
be a liberal interpretation of the law--

MR. BLAUFARB: (Interp'g) I said strict.

JUDGE BERNSTEIN: Please, you can speak  
afterwards.

MR. LINDEN: --is so far removed from  
what the issues are in this case as to be in  
the moon. I'll not comment on it further.  
The only thing that is involved here is whether  
this episode in anyway affected a long-stand-  
ing tumor in this man's jaw that was so far  
advanced that his jaw was practically and  
entirely destroyed; it had destroyed all the  
mandible except way in the front, a thinning  
margin in the bottom and one in the back.  
It is perfectly clear that any surgeon who  
found such a condition had to operate and if  
they didn't they would be guilty of malpractice.



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2 And in respect to what happened here,  
3 although at the earlier stages of this trial  
4 when I stated most seriously that I thought  
5 it fortuitous that this had happened--  
6 because if it had not been taken it would have  
7 been there all this time unbeknowing to this  
8 man--the operating surgeon said he didn't  
9 know whether the prosthesis that he put in  
10 would finally take because the destruction  
11 had gone so far. The only question that's  
12 been presented here is not a question of  
13 law or anything else. If it is aggravation  
14 we are responsible. If it isn't aggravation  
15 we are not. That's the only issue. We  
16 submit to you that the episode in this  
17 case was most trivial. He did not even  
18 knock loose the lower bridge. He took it  
19 out an hour later. This little exudate  
20 was coming forth, the dentist didn't cause  
21 the exudate; it was merely allowed to escape.  
22 So it was noticed. And he sought medical  
23 attention and I say for him most fortunately.  
24 Dr. Sage has just stated that there was no  
25 evidence of any change in the tumor histolog-

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2 ically as well as otherwise and I think you  
3 recall in the early stages of the testimony  
4 it was admitted by the operating surgeon  
5 that the histological--and that is the exam-  
6 ination of the specimen taken on biopsy--  
7 there was no evidence of change in the  
8 nature of the cells. There were no growing  
9 cells described and after the operation  
10 when they did another pathological examin-  
11 ation there were still no cells shown and  
12 Dr. Sage has stated that there should be  
13 evidence histologically on pathological  
14 examination that there were cells there that  
15 were different than the long standing cells  
16 that previously existed--and there were none.  
17 The tumor after the operation was the same  
18 as it had been before the episode. It was  
19 purely a destructive, expanding lesion that  
20 had to be removed for the good of this  
21 patient.

22 We say that it is quite clear that the  
23 claimant's operating surgeon could find no  
24 evidence at all, no specific clinical find-  
25 ing of any sort, that showed the tumor itself



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2 had been infected. This tumor is in the  
3 bone. Even when the membrane, the gingiva,  
4 the lining, the thin lining above the bone  
5 was broken it didn't break the bone at all.  
6 If this trauma had any significance what-  
7 ever in view of the extent of the disease of  
8 this bone it would have been shown on x-ray.

9 Pathological fractures occur without  
10 trauma where the bone is. Very slight, trauma  
11 will cause fracture.

12 Yes, this man had an episode and I say  
13 fortunately and it was so slight that I say  
14 trauma reflected in the area did not cause a  
15 break in the serous of the bone and we sub-  
16 mit that the measure of the lack of serious-  
17 ness of injury to the mandible resulting from  
18 the accident is the main thing here. There  
19 was. It was a superficial contusion, per-  
20 haps a hematoma, of the soft tissue. It did  
21 not affect the tumor.

22 We submit the examination of a claimant's  
23 doctor's testimony shows not one scintilla  
24 of evidence that there has been any change in  
25 the rate of growth in the course of the tumor

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and in the findings, nothing.

And he finally admitted that the statements are speculation and by the way, the pathologist was not one whom we selected. Obviously since he had performed the pathological examination his testimony is of information. We brought him in for that reason.

Dr. Tagliagambe saw this man immediately after and all he saw and all the operating surgeon actually ever saw was this little area of penetration where there was a space open enough to allow the serous fluid to come out. It didn't affect the tumor.

There is also no substance of relationship and therefore leaving the so-called sociological factors aside, the effective law and all the rest of it which is absolutely immaterial and upon which we all agree, there is no relationship in this case, the episode caused nothing more than a contusion of the cheek and of the shoulder; all of the operative procedures were performed



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2 including that of October 5th and the ones  
3 which certainly had to be done for the re-  
4 moval of this tumor on November 15 had no  
5 relationship, strictly indirectly or other-  
6 wise, and we ask therefore that the claim be  
7 disallowed on that basis. We paid compen-  
8 sation for a short period of time up to  
9 the date that Dr. Tagliagambe stated that  
10 the effects of the trauma to the jaw had  
11 ceased and as far as that was concerned we  
12 note that the claimant continued working.  
13 We paid that. The claimant returned to  
14 work. The cessation of work and the loss  
15 of 57 days was occasioned by the necessary  
16 operative procedure which we say was not in  
17 anyway related to our accident.

18 We say therefore that you should dis-  
19 allow any aspects of the claim that has to  
20 do with the procedures that Dr. Albanese  
21 performed either on October 5, November 15  
22 and subsequently.

23 JUDGE BERNSTEIN: Are you finished?

24 MR. LINDEN: Yes.

25 JUDGE BERNSTEIN: Thank you.

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MR. BLAUFARB: Mr. Linden quite evidently has missed the thrust of what Dr. Albanese said.

No one here is claiming that this incident or accident caused a tumor to metastize. This is not our claim.

Dr. Albanese clearly stated in all probability based upon reasonable medical certainty, had this trauma not occurred he probably would not--would have lived the rest of his life without having any problem whatsoever. This is exactly what the doctor said.

Mr. Linden did not review this aspect of the testimony with the physicians that he called and this is--the only medical testimony as to this point was answered by Dr. Albanese.

MR. LINDEN: I'm afraid that Mr. Blaufarb remarks about what Dr. Albanese has stated as to the possibility of this man's existence and the trauma is speculative and it is.

The testimony of Dr. Sage, the testimony



1  
2 of Dr. Tagliagambe and the pathologist  
3 clearly say to the effect when you get a  
4 tumor like this you don't let a man sit  
5 around and let it invade his bone. You take  
6 it out. And that was what was done. And  
7 as far as metastasis was concerned, I don't  
8 know where Mr. Blaufarb got that from.  
9 We are not involved with metastasis. Nothing  
10 was said about it. I didn't say it. There  
11 is no element of metastasis here at all.

12 I say what Dr. Albanese said was pure  
13 speculation. He had nothing to back it up.  
14 What he stated was his opinion. He was  
15 evasive as a witness. He was unwilling to  
16 admit that the pathology could have advanced  
17 so that anything could have caused an open-  
18 ing from the lower portion of the jaw where  
19 the tumor was to the oral cavity.

20 Dr. Sage pointed out that this is what  
21 you always see. When the exudate comes  
22 through it is a small opening. That's all  
23 that was ever described by anybody. We  
24 submit that our brief statement was correct  
25 and there was nothing omitted and we again

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renew our motion.

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JUDGE BERNSTEIN: Thank you, Mr. Linden.

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MR. LINDEN: I have nothing further.

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JUDGE BERNSTEIN: Mr. Blaufarb, let me review with you what you're asking in the way of release.

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Can you review for me the claim, what you wish this Court to grant you?

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MR. BLAUFARB: Well, the claim involves, as is set forth by the Joint Exhibit No.1, sir --incidentally, before we answer, as was set forth by the reference to this honorable Court, the issue is the fact as to whether or not in fact this trauma aggravated and exacerbated a preexisting asymptomatic ameloblastoma. Involved here are serious facial disfigurement. That's No.1. No.2, there has been to date a long period of inability to take solid food. There is a facial disfigurement noted, I believe, just upon physically looking at the claimant as well as scars involved. There is an issue here of disability for the 57 days and there is an issue here as to subsequent medical care



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2 in event the bar, the titanium platform  
3 or shelf, has to be removed. The average  
4 weekly wage here, I believe, is about \$218--

5 JUDGE BERNSTEIN: (Interp'g) Is that  
6 agreed to?

7 MR. LINDEN: Yes.

8 JUDGE BERNSTEIN: 218 what?

9 MR. BLAUFARB: Fourteen cents.

10 So that would be the maximum rate, I  
11 believe.

12 MR. LINDEN: What do you say it was?

13 MR. BLAUFARB: \$218.14.

14 JUDGE BERNSTEIN: That's stipulated?

15 MR. LINDEN: I'll go along with that.

16 JUDGE BERNSTEIN: Fine.

17 And you're claiming for 57 days over  
18 and above what was paid; is that correct?

19 MR. BLAUFARB: That's correct.

20 JUDGE BERNSTEIN: What else are you  
21 claiming for?

22 MR. BLAUFARB: Facial disfigurement,  
23 scarring.

24 JUDGE BERNSTEIN: What are you claiming?

25 MR. BLAUFARB: Sensory loss to the left

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lip, the left lower lip, sensory loss as set forth by Dr. Albanese.

JUDGE BERNSTEIN: What do you want me to give you in the way of monetary recovery? I'm not sure what you want in that regard.

MR. BLAUFARB: There is inability to chew food--

MR. LINDEN: (Interp'g) That's temporary.

MR. BLAUFARB: Possibly. Maybe it is permanent.

The disability as is set forth is clearly outlined in Dr. Albanese's reports.

JUDGE BERNSTEIN: Are you claiming for any specific compensation by virtue of this patient's disfigurement?

MR. BLAUFARB: Specifically I believe it is in your descretion, if it pleases the Court, pursuant to the record that you heard and the medical reports.

JUDGE BERNSTEIN: The section that you are claiming under is Section 8 (c)(20) under the Act, which classifies a permanent partial disability disfigurement and the



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2 language is: "proper and equitable compen-  
3 sation not to exceed \$3500 shall be awarded  
4 for serious disfigurement of the face, head  
5 or neck or of other normally exposed areas  
6 likely to handicap the employee from sec-  
7 uring or maintaining employment."

8 Is this what you're claiming, Mr.  
9 Blaufarb?

10 MR. BLAUFARB: Yes.

11 JUDGE BERNSTEIN: Are you claiming  
12 anything else?

13 MR. BLAUFARB: In addition thereto as  
14 set forth in Dr. Albanese's report, there is  
15 a sensory loss about the left lower lip and  
16 inability to masticate--an inability to chew--  
17 and as the doctor said, it is a little too  
18 early to tell as to whether or not they will  
19 be able to fit him with a prosthesis so he  
20 can chew.

21 JUDGE BERNSTEIN: I would like for the  
22 witness to step back to the witness stand  
23 and I would like for you to show me what  
24 you consider to be the disfigurement.

25 (Whereupon, the witness returns to the

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witness stand.)

MR. BLAUFARB: There is a scar located under the mandible extending back toward the ear lobe; there is a symmetry of the jaw as opposed to the left jaw--

MR. LINDEN: (Interp'g) The asymmetry may or may not be permanent.

JUDGE BERNSTEIN: You're talking about the line there?

MR. BLAUFARB: Right.

MR. LINDEN: The scar of course there is no question about it. If it is compensable he will be entitled to it.

JUDGE BERNSTEIN: So if you concede that if we do find a connection between the trauma and the condition the facial disfigurement will apply?

MR. LINDEN: Yes, to whatever extent seems reasonable up to the limit of \$3500.

MR. BLAUFARB: And there is a loss in the lower lip.

MR. LINDEN: It is not compensable.

MR. BLAUFARB: It arises from the removal of the nerves arising from the oper-



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MR. BLAUFARB: Yes.

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JUDGE BERNSTEIN: What else are you claiming for?

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MR. BLAUFARB: That's all; plus the attendant physicians' services and hospitals and pharmaceutical expenses.

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JUDGE BERNSTEIN: You're not disputing the amount of these bills, are you, or the right to compensation?

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MR. LINDEN: I don't know if we have seen them. We did. We raised that issue initially, if you recall. We said we had not authorized the procedure and we were opposed to it because we didn't know. Perhaps if we had seen it first the whole thing should have been done at one time. We don't know.

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JUDGE BERNSTEIN: I would like this issue

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expanded more in the brief.

. MR. LINDEN: Sure.

JUDGE BERNSTEIN: I think we have covered the issues.

Is there anything further?

There is a question of Exhibit 1.

MR. BLAUFARB: Yes.

The Department of Labor file has to be returned by Mr. Linden to the Department of Labor and since the whole file is marked in evidence and there is some interesting material in the hospital record and in the record of the ILA with respect to the condition subsequent to the incident, as well as prior to the incident, I believe it would be most helpful in arriving at your decision.

JUDGE BERNSTEIN: I intend to have it.

MR. LINDEN: That's part of the record. It is the mechanics of how we accomplish this.

JUDGE BERNSTEIN: I'll tell you what the mechanics will be. I'll assume responsibility for and possession of Joint Exhibit 1 as of



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2 now and if you are questioned by the Deputy  
3 Commissioner you may tell him that you have  
4 turned the file over to me as the Adminis-  
5 trative Law Judge.

6 MR. LINDEN: That is your direction to  
7 me now?

8 JUDGE BERNSTEIN: Yes. And he can com-  
9 municate with me further.

10 Let's discuss the time for submission  
11 of briefs.

12 How much time do you each feel you will  
13 need?

14 MR. BLAUFARB: I would need roughly  
15 two weeks.

16 JUDGE BERNSTEIN: Mr. Linden?

17 MR. LINDEN: I would like to ask for  
18 three weeks for one reason: we had another  
19 one which was on yesterday and I had not  
20 thought I would submit a brief there but I  
21 think we should and I'll tell my opposing  
22 counsel that. Give us each two and a half and  
23 I won't object. I contemplated simultaneous  
24 briefs with the right to submit supply briefs.

25 JUDGE BERNSTEIN: I'll give you to

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November 1st, both of you.

MR. BLAUFARE: Fine.

MR. LINDEN: Fine.

JUDGE EERNSTEIN: We'll make it 5 November 1973. So that will be better for you.

So if both parties will submit by 5 November, 1973 their briefs together with the following: (1) proposed findings of fact; (2) proposed conclusion of law; and (3) a proposed compensation order.

Now, with respect to any application by counsel for claimant for attorney's fees, I would like you to submit together with the other papers at the same time a breakdown of the time that you have spent on the various phases of this proceeding together with what you consider to be a reasonable hourly rate for your professional services.

MR. LINDEN: When will I see Mr. Blaufarb's brief?

JUDGE BERNSTEIN: Simultaneous briefs with a right to submit reply briefs.

MR. LINDEN: That's fine.



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2 JUDGE BERNSTEIN: So at the same time  
3 that each of you furnish the Court a copy  
4 of your brief and proposed findings and  
5 proposed conclusions and proposed compen-  
6 sation order, you will submit the same to  
7 your adversary and if either or both of  
8 you wish to submit further, on application  
9 you will have that opportunity.

10 MR. LINDEN: On how many days after  
11 November 5th will we have to notify whether  
12 we wish to reply?

13 JUDGE BERNSTEIN: I will give you ten  
14 days after November 5th in which to reply.

15 MR. LINDEN: Thank you very much.

16 JUDGE BERNSTEIN: Mr. Blaufarb, do you  
17 have anything further?

18 MR. BLAUFARB: No.

19 JUDGE BERNSTEIN: Mr. Linden?

20 MR. LINDEN: No, sir.

21 JUDGE BERNSTEIN: This concludes the  
22 taking of testimony and this hearing. The  
23 hearing is adjourned and will be officially  
24 terminated in accordance with Rule 702.347  
25 of the implementation regulations as pub-

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lished in Volume 38, No.17, of the Federal

3

Register on 26 January 1973.

4

Briefs ought to be mailed to me: Judge

5

Edwin Bernstein, Office of Administrative

6

Law Judges, Suite 820, 1717 K Street, N.W.,

7

Washington, D.C. 20210.

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(Whereupon, the instant hearing was

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concluded at 3:45 P.M.)

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13 Sworn to before me this \_\_\_\_\_

14 day of \_\_\_\_\_, 1973.

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REPORTER'S CERTIFICATE

THIS IS TO CERTIFY that the attached  
proceedings before the Administrative Law Judge  
of the United States Department of Labor, in the  
matter of:

Name of Proceeding: Edward Potenza v. United  
Terminals, Inc.

Case No.: 73-LHCA-111

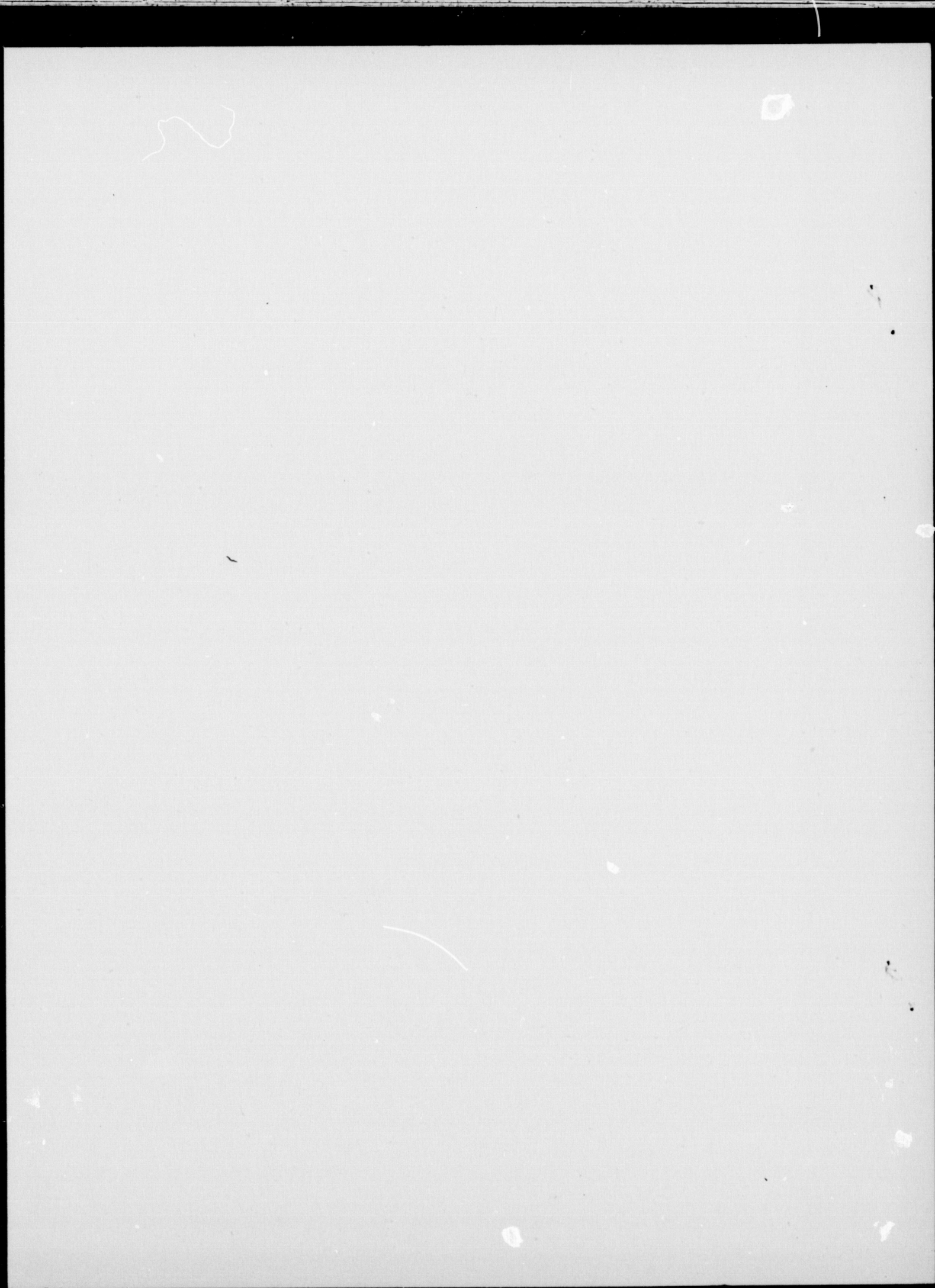
Date: October 5, 1973

Place: 26 Federal Plaza,  
New York, N.Y.

were held as therein appears, and that this is the  
original transcript thereof for the files of the  
Department of Labor.

WILLIAM S. EADDY  
Stenotype Reporter

By William S. Eaddy





**United States Court of Appeals  
for the Second Circuit**

376—Affidavit of Service by Mail

The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

**In The Matter of the  
Claim for Compensation under the Longshoremen's and Harbor Workers  
Compensation Act made by Edward Potenza**

**Claimant-Appellee**

**against**

**United Terminals Inc., Employer-Appellant  
and Federal Insurance Company, Carrier-Appellant**

**State of New York, County of New York, ss.:**

**Raymond J. Braddick,**  
**agent for Linden & Gallagher Esqs.**

, being duly sworn deposes and says that he is  
the attorney

for the above named **Appellant**

herein. That he is over

21 years of age, is not a party to the action and resides at

**Levittown, New York**

That on the **10th** day of **April**, 19**75**, he served the within  
**Brief and Appendix**

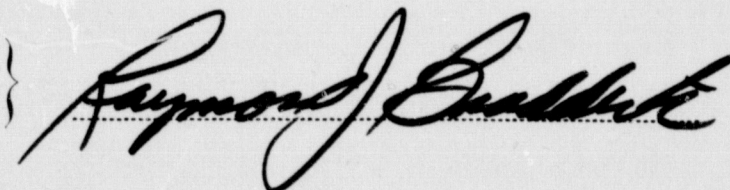
upon the attorneys for the parties and at the addresses as specified below

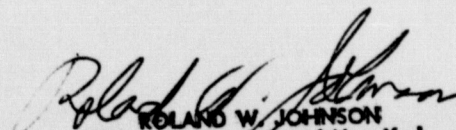
1. **Edward Polenza**  
**Attorney for Claimant-Appellee**  
**238 Harrison Street**  
**Leona, New Jersey**
2. **William J. Kilberg Esq.**  
**Solicitor of Labor**  
**Attorney for Director**  
**Office of Workmen's Compensation Programs**  
**200 Constitution Avenue N.W.**  
**Suite N2716**  
**Washington, D.C.**
3. **Leon Blaufarb Esq.**  
**Kalmanson, Klapper, & Blaufarb Esqs.**  
**Appellees Previous Attorneys below**  
**225 Broadway**  
**New York, New York**

by depositing **2 copies of Brief and two copies of Appendix**  
to each of the same securely enclosed in a post-paid wrapper in the Post Office regularly main-  
tained by the United States Government at  
90 Church Street, New York, New York

directed to the said attorneys for the parties as listed above at the addresses aforementioned,  
that being the addresses within the state designated by them for that purpose, or the places  
where they then kept offices between which places there then was and now is a regular com-  
munication by mail.

Sworn to before me, this **10th.**  
day of **April**, 19**75**



  
**ROLAND W. JOHNSON**  
**Notary Public, State of New York**  
**No. 4509705**  
**Qualified in Delaware County**  
**Commission Expires March 30, 1977**